IN THE SUPREME COURT

APPEAL FROM THE COURT OF APPEALS

J & J CONSTRUCTION CO.,

Plaintiff-Appellant,

Docket No. 119357

-vs-

BRICKLAYERS AND ALLIED CRAFTSMEN, LOCAL 1 and MARK KING, jointly and severally,

Defendants-Appellees.

BRIEF ON APPEAL – APPELLANT

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Plaintiff/Appellant, J&J Construction Company, appeals from the published decision of the Court of Appeals issued on May 11, 2001, which reversed the Judgment entered by the Wayne County Circuit Court on November 7, 1997, and partially remanded the case to the trial court.

Plaintiff/Appellant requests that the decision of the Court of Appeals be reversed, and that the Judgment of the Wayne County Circuit Court be reinstated.

STATEMENT OF QUESTIONS PRESENTED FOR REVIEW

1. Did the Court of Appeals clearly err in holding that Defendants/Appellees are entitled to qualified immunity from liability for defamation of Plaintiff/Appellant because the defamatory statements were made to a city government in an attempt to convince the city not to award a contract to Plaintiff/Appellant for which it was the lowest qualified bidder, where it is undisputed that Plaintiff/Appellant is a private figure and the Supreme Court of the United States, this Court and the Court of Appeals have previously held, and the Legislature has provided, that there is no qualified immunity for defamation of a private figure, regardless of whether committed in the context of petitioning or other First Amendment activity?

Plaintiff/Appellant answers: Yes
Defendants/Appellees answer: No

2. Did the Court of Appeals clearly err in holding that Defendants/Appellees are absolutely immune from liability for tortious interference with business expectancy under the *Noerr-Pennington* doctrine, where the interference was committed through false and defamatory statements were made to a city government in an attempt to convince the city not to award a contract to Plaintiff/Appellant for which it was the lowest qualified bidder, and the Court of Appeals refused to follow established federal and state precedent which holds that false and defamatory statements do not constitute protected activity under the Petition Clause of the First Amendment?

Plaintiff/Appellant answers: Yes
Defendants/Appellees answer: No

3. Did the Court of Appeals clearly err in holding that Defendants/Appellants are entitled to absolute immunity from liability for tortious interference with business expectancy under the *Noerr-Pennington* doctrine, where the Court of Appeals refused to follow extensive and unbroken federal precedent holding that wrongful attempts to influence a governmental body which is not acting in a governmental role but acting purely as a consumer of goods and services in the marketplace are not within the protection of the Petition Clause of the First Amendment?

Plaintiff/Appellant answers: Yes
Defendants/Appellees answer: No

I. INTRODUCTION

This is an action for defamation and intentional interference with business and contractual relations. Plaintiff-Appellant, J & J Construction Co. ("J & J Construction" or "J & J"), brought this action after a series of false and defamatory statements were made by Defendant-Appellee Bricklayers and Allied Craftemen, Local 1 ("the Union"), through its employee, Defendant-Appellee Mark King ("King")(collectively, "Defendants"), with both the intent and result of depriving J & J Construction of a contract with the City of Wayne for which it was the lowest qualified bidder.

After hearing five days of testimony and considering the briefs filed by the parties, the trial court found that King, authorized by the Union, made false statements to the City Council of the City of Wayne and defamed J & J Construction causing the loss of a contract for which J & J was the lowest qualified bidder. The trial court additionally found that Defendants, through King's defamatory statements, had intentionally interfered with J & J's business expectancy in the Wayne contract.

There is no dispute that J & J Construction is a purely private figure. Consistent with the constitutional considerations set forth by the United States Supreme Court in ***New York Times v Sullivan*** and ***Gertz***, the Legislature has required that a defamation action by a private figure requires proof only that the defamatory statement was "published negligently." ***MCL 600.2911(7)***. The statute requires proof of "actual malice" only where the plaintiff is a public official or public figure. ***MCL 600.2911(6)***.

In ***Rouch v Enquirer & News of Battle Creek***, 427 Mich 157, 203; 398 NW2d 245 (1987), the late Justice James H. Brickley, based on an exhaustive and carefully reasoned exposition of the public policy and constitutional issues presented, and a thorough examination

of state and federal case law, found that a "need to further sacrifice tort recovery for false defamation of a private person resulting from negligence has not been shown." His opinion for the majority directly held that a private figure plaintiff in a defamation action "was not required to show malice on the part of the defendant," as is a public official or public figure. ***Id.***

Yet the Court of Appeals panel below reversed the trial court's judgment in J & J Construction's favor, based on immunity and privilege concepts which extend far beyond the intent and language of Michigan's defamation statute and well-reasoned state and federal precedents. Without engaging in the exhaustive and scholarly examination employed by Justice Brickley, the panel apparently assumed a "further sacrifice tort recovery for false defamation of a private person" and engrafted a requirement of proof of "actual malice" merely because the defamatory statements were made to a City Council.

The Court of Appeals leapt to the chance to sacrifice a private person's right to recover for defamation, disregarding ***Rouch*** and overruling, without explanation or authority, prior Michigan decisions directly on point. The panel relied on Defendants' unsupported and slanted characterization of the facts, ignoring the specific and unchallenged findings of fact made by the trial judge. The panel erroneously interpreted existing law as set forth by this Court, the United States Supreme Court and the federal Courts of Appeal, creating for the first time a privilege for intentional interference with legitimate expectancy for government contracts accomplished through defamation. Finally, the panel ignored principles of *stare decisis* by silently and incorrectly overruling the prior holding of the Court of Appeals in ***Hodgins Kennels Inc v Durbin***, 170 Mich App 474; 429 NW2d189 (19988).

If permitted to stand, the panel's decision would subject all businesses in this State to wrongful and defamatory interference with their ability to contract with public entities, without

the recourse granted by the Legislature and this Court to all other private persons and entities.

II. FACTUAL BACKGROUND.

J & J Construction Company is a masonry contractor located in Wixom, Michigan. It is owned by Jonathon J. Snyder, its President, who founded the company in 1985. [***Appendix***, p. 63a]. In the spring of 1995, J & J submitted a bid on a project for the construction of an Aquatic Center and swimming pool by the City of Wayne. Under the Wayne City Charter, the City was required to award bid projects to the lowest responsible bidder. According to the Bid Documents and Specifications, the City was "to award a contract to the lowest responsible bidder provided that the bid had been submitted in accordance with the requirements and bid documents and does not exceed the funds available...." [***Appendix***, p. 18]. It is undisputed that J & J Construction was the lowest responsible bidder for the masonry portion of the project, and that its bid had been properly submitted.

King, before becoming a field representative, had been a bricklayer for fifteen years, with ten years as a journeyman. [***Appendix***, pp. 35a-36a]. He had taught masonry courses at Macomb Community College, and considered himself to be a skilled tradesman. [***Appendix***, pp. 36a-37a]. Since becoming a field representative for the Union in 1994, King's job entailed visiting masonry construction sites, and he acknowledged that he had viewed "a lot" of masonry construction. [***Appendix***, p. 37a].

King heard that J & J Construction was the low bidder on the Aquatic Center project and began the Defendants' campaign to interfere with J & J's ability to obtain the job.[1]

A. DECEPTIVE PHOTOGRAPHS.

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[1] It is undisputed that all of King's conduct on which the judgment below is based was conducted on behalf of and in his capacity as a representative of the Union.

In March, 1995, King went to a construction project at Novi High School where J & J Construction was working, for the sole purpose of taking Polaroid photographs of the masonry work. He took 8 to 10 Polaroid photographs of portions of the work. [***Appendix***, pp. 38a, 39a]. The photographs show only a minuscule portion of the work done by J & J, and were selected and framed to misrepresent and falsely portray the work of J & J Construction. [***Appendix***, p. 73a].

Mr. George Ehlert ("Ehlert"), a licensed professional structural engineer with extensive masonry experience, including substantial work on school projects[2], testified that none of the photographs showed poor workmanship, and that they were not "fair and accurate" portrayals of the masonry work performed by J & J Construction on the Novi project. [*Appendix*, pp. 53a, 59a].

One of the photographs purported to show a "misalignment" of the joints between the bricks of two adjoining walls, which King falsely stated was an example of poor masonry work. Undisputed testimony at trial established, however, that the corner depicted in the photograph is between new doors and existing doors which are one inch different in height; *i.e.*, the bricks could not line up exactly from one doorway to the other. [*Appendix*, pp. 57a-59a]. Mr. George Hamlin ("Hamlin"), the senior supervisor on the Novi project for Barton Mallow Company, the project construction manager, testified that the any "misalignment" was the result of existing conditions, and that he had *directed* J & J Construction to construct the doorway and lay the brick shown in the photograph in that manner to accommodate the existing condition.

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[2] Mr. Ehlert had served for the previous five years on the school board in South Lyon, Michigan, and was the board's representative for all construction work in the district. [***Appendix***, p. 49a].

[***Appendix***, p. 30a].

Ehlert testified that the construction technique employed by J & J Construction at the site of King's photograph took the unavoidable variation and "put it on the side where it would be least visible and least intrusive to the vast majority of people." [***Appendix***, p. 62a]. According to Ehlert, King's photograph was "taken in a manner to clearly exclude the surrounding material so that the casual observer of the photographs would be mislead." [***Appendix***, p. 60a]. He also testified that, based on King's experience as a mason,[3] King had to have known both that the photograph was misleading, and that the reason the joints didn't line up was "for reasons other than faulty workmanship." [***Appendix***, p. 61a].

The five remaining photographs were taken by King inside the future locker room, a very small portion of the project. These photographs show the incomplete installation of ceramic-coated "tile" bricks that had not yet been cleaned, with the mortar joints still wet, in an area which would eventually be *covered up by lockers.* [***Appendix***, pp. 51a-52a]. Four of the photographs were intended by King to represent that the mortar joints between the tile bricks were too large. Both Ehlert and Hamlin testified, without contradiction, that the mortar joints were within the tolerances established by the architect and relevant trade associations. [***Appendix***, 34a; 50a]. Moreover, the differences in width of the mortar joints were not the result of faulty workmanship, but of the inherent variations in the tile bricks. [***Appendix***, pp. 55a, 56a; 31a].

Further, the photographs were taken when the tile bricks had not yet been cleaned, and were wet from work being done overhead. [***Appendix***, p. 53a]. Prior to cleaning, the mortar in

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[3] As of the time of trial, King was a journeyman bricklayer with over 15 years experience.

the joints overlaps the bricks, making the joints appear wide and irregular. [***Appendix***, p. 59a]. Both Ehlert and Hamlin explained that the dampness of the wall also makes the joints appear wider. [***Appendix***, pp. 32a; 56a]. Ehlert testified that a competent, experienced bricklayer would know that these conditions would make the mortar joints look larger than they actually were. [***Appendix***, p. 56a].

The final photograph shows a corner in the locker room, and was intended by King to represent faulty workmanship in failing to align the mortar joints from the two walls. As Hamlin testified, however, the lack of precise alignment was caused by a difference in the height of the concrete footing underlaying the right-hand wall and the slab underlaying the left-hand wall; a problem caused by the *concrete contractor*, and not J & J Construction. [***Appendix***, p. 33a]. The photograph actually depicts "a job site condition that the mason had to deal with," and not any faulty workmanship. [*Id.*]

The trial court specifically credited the testimony of Ehlert that the photographs were misleading. [***Appendix***, p. 73a]. The photographs were misleading because: they were taken in extreme close-up, "in a way to put the wall in a very unfavorable light"; they failed to show the surrounding conditions which required the particular construction techniques employed; they were taken when the walls were wet; and they were taken before the walls had been cleaned. [***Appendix***, p. 53a-54a].

It is undisputed that King never told any of the individuals to whom he later showed these photographs that J & J was not responsible for the out of line bricks, had not completed the tile work that was shown, had not had the opportunity to clean it, and that lockers would cover most of the area. Further, King did not have any experts review these photographs or this work, did not discuss the quality or acceptability of the work with the construction manager, and did not

determine whether the architect of the project had any concerns or problems with the workmanship.

B. DEFAMATION -- CITY OFFICIALS.

First, King set up a meeting with John Zech, City Manager for the City of Wayne. At that meeting, King showed Mr. Zech six of the misleading photographs he had taken of the Novi High School project. King stated that J & J Construction Company did poor quality work and that these photographs represented inferior workmanship. [***Appendix***, p. 41a].

King then arranged a meeting with Kimberly Fallow, Director of the Department of Recreation for the City of Wayne and the person in charge of the swimming pool project. King repeated the same false and defamatory statements to Ms. Fallow and showed her the six (6) photographs. [***Appendix***, p. 41a-42a]. He told Ms. Fallow that the photographs were reflective of the type of work that could be expected from J & J Construction, and questioned J & J's ability to perform the contract for the swimming pool project. [***Appendix***, p. 41a].

C. DEFAMATION -- PUBLIC MEETING OF WAYNE CITY COUNCIL.

On May 31, 1995, King appeared before the Wayne City Council at a meeting concerning the award of contracts for the various construction elements of the swimming pool project. During the time the City Council considered the bids for the masonry portion of the swimming pool project, King asked to address the Council. *King never identified himself as a representative of the Union.*[4]

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[4] The trial court found, in denying Defendants' motion for judgment at the close of J & J Construction's case, that King had not identified himself as "being involved with the union." King acknowledged that he had not so identified himself when he appeared before the Westland City Council, and stated "I don't even know if I did when I was at the City of Wayne to tell you honestly." [***Appendix***, p. 44a-45a].

King stated that J & J Construction did not do quality work, specifically mentioning the Novi project as an example of poor workmanship, and showed the misleading photographs he had taken to the Council and members of the audience. [***Appendix***, p. 40a]. King also represented to the Council that J & J might be unable to perform the swimming pool job in a timely manner. [***Id.***]

King admitted, however, that he had no knowledge that J & J Construction had ever failed to perform a contract on time. [***Appendix***, p. 43a]. He attempted to support his statement at trial solely with the fact the J & J had, on one occasion, subcontracted a portion of a job to a union contractor, Held & Held, Inc. Wayne Held testified that it was not unusual for masonry contractors to subcontract work to other contractors. [***Appendix***, p. 29a]. The particular subcontract from J & J Construction was for ten to fifteen percent of the masonry work on the Livonia Churchill High School job, and there were no problems getting the work done timely. [***Id.***]

There was no evidence presented at trial that the subcontracting to Held & Held, Inc., was related to any inability of J & J Construction to perform the Churchill contract on time. To the contrary, the undisputed testimony of Snyder, which was credited by the trial court, established that the reasons for the subcontract were that Held & Held, Inc. was lacking work and seeking to fill an open time slot, and the subcontract was convenient for J & J Construction. [***Appendix***, pp. 64a-65a].

Based on the testimony of Held and Snyder, and the fact that the Union presented no evidence to dispute their testimony, the trial court found that King's statement "that J & J Construction could not finish a job on time was in fact a false statement." [***Appendix***, p. 75a].

The trial court also found, based on the testimony of Hamlin and Ehlert, that King's

statement that J & J Construction had done poor quality work at the Novi High School job was false. [***Appendix***, p. 74a]. The trial court specifically noted, moreover, the undisputed testimony of Michael Brazen, a foreman at J & J, that King had told him – on the day that King took the misleading photographs, and as he was leaving the job with his camera around his neck – that the Novi job had "turned out nice." [***Appendix***, pp. 82a, 48a]. More than a month after making his defamatory statements, King expressed to Gerald Snyder his belief that J&J "does good work". [***Appendix***, p. 66a].

King admitted that his appearance before and statements to the Council were intended "to raise the eyebrows of the council and make them skeptical of J & J." [***Appendix***, p. 41a]. He had prepared his presentation prior to the meeting, yet in that presentation he made no mention of his representation of or affiliation with the Union, or urged any reason for denying the contract to J & J Construction other than its alleged deficiencies. King admitted that his Union affiliation was "not important to what [he] wanted to say." [***Appendix***, p. 47a].

Only after the representative of the construction manager for the swimming pool project had spoken in defense of J & J Construction, and *as an afterthought*, did King make any reference to J & J being a non-union contractor. Far from urging any policy decision on the Council, King merely said something to the effect of "well, he's a non-union contractor and this is a union town." [***Appendix***, p. 46a].

As a result of King's defamatory statements, the City Council "referred back to administration for further review" the low bid of J & J Construction. [***Appendix***, p. 28a]. At the Council's June 20, 1995 meeting, the masonry contract for the Aquatic Center was awarded to the second lowest bidder, and not J & J Construction, because, in part, "the Council had concerns

as to the low bidder because of claims made about faulty workmanship."[5] [***Appendix***, p. 26a]. The trial court found that King's defamatory statements in fact cost J & J Construction the Wayne Aquatic Center job, causing J & J damages in the amount of $57,888.00. [***Appendix***, p. 84a, 87a].

III. PROCEDURAL BACKGROUND

Because King's defamatory remarks had interfered with its business, resulting in the loss of the Wayne Aquatic Center contract and, potentially, other jobs, J & J Construction filed its Complaint against Defendants in the Wayne County Circuit Court on August 10, 1995. With leave of the trial court, a First Amended Complaint was filed on December 19, 1995, stating three causes of action: defamation, intentional interference with business relationship or expectations, and a request for injunctive relief prohibiting further defamatory statements by the Defendants.[6]

Trial to the court commenced on July 14, 1997, and proceeded intermittently through August 4, 1997. On September 4, 1997, the trial court delivered its opinion from the bench, granting judgment in favor of J & J Construction on its claims of defamation and intentional interference with business relations or expectancy, but denying the requested injunctive relief. [***Appendix***, p. 84a, 86a-88a, 90a]. The court awarded damages in the amount of J & J's lost profits for the Wayne Aquatic Center, $57,888.00. [***Appendix***, pp. 87a-88a]. In addition, J & J

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[5] About two months after speaking in Wayne, King made the same defamatory statements at a meeting of the Westland City Council, in an attempt to prevent J & J Construction from being awarded another job for which it was the low bidder. Because J & J Construction was awarded the contract notwithstanding King's defamation, the trial court found that it had sustained no damages.

[6] The First Amended Complaint is the operative pleading, and will be referred to, for simplicity, as "the Complaint."

Construction was awarded its attorney fees under the defamation statute, ***MCL 600.2911(7).***

A. THE TRIAL COURT'S OPINION.

In its opinion granting judgment to J & J Construction, the trial court carefully reviewed the elements of the defamation and interference with business expectations claims. The opinion then explained how, based on specific evidence, J & J Construction had carried its burden of proof regarding each of those elements.

1. DEFAMATION CLAIM

a. King's statements were false and defamatory.

On the first element of the defamation claim – that a false and defamatory statement was made about the plaintiff – the court identified three statements made by King to City of Wayne officials:

> One dealing with the quality of the work that was done by J & J Construction, the second being whether or not J & J Construction could complete a job on time. And the third being whether or not the prevailing wage had been paid by the plaintiff.[7]

[***Appendix***, p. 72a].

First, it must be noted that the trial court specifically found that King had made *statements* and not, as Defendants urge and the Court of Appeals implied, merely asked questions:

> I do find that the comments that were made were not merely questions that

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[7] Defendants claim that the trial court determined that King's statement that J & J Construction did not pay prevailing wage "was true (actually the court would only say that the statement was not false)." [***Brief of Defendants-Appellants***, at 7]. This is a mischaracterization of the court's ruling. What the court held was only that "the plaintiff has not carried his (sic) burden with regards to showing that the statement made by Mr. King regarding the failure to pay prevailing wage was a false statement." [Trial Ct Op, ***Ex 3***, at 11]. This is no more than a conclusion that the truth or falsity of King's statement had not been established, *either way*.

> were raised nor were they merely opinions stated, but they were defamatory statements, they were made as I find as declaratory statements made with the intention of preventing the plaintiff from getting the contract.

[***Appendix***, p. 85a].

Regarding King's statement that J & J Construction did not do quality work, the court specifically addressed the evidence presented at trial. It noted:

> 1) that Hamlin, the project supervisor of the Novi job, was satisfied and pleased with J & J Construction's work, and that the brick and tile brick work represented by King as faulty (non-aligned joints) was done according to his direction;
>
> 2) that Ehlert found no faulty workmanship on the Novi project, and found the photographs displayed by King to be misleading because they were not an accurate representation of the work performed by J & J Construction; and
>
> 3) that Ehlert demonstrated that the tile work done by J & J Construction had the "same kind of spacing between the tiles" as that represented in the brochures of the manufacturer of the tile bricks.

[***Appendix***, p. 72a-73a}.

The court specifically credited Hamlin's testimony, as well as Ehlert's, which he found "persuasive" [***Appendix***, p. 73a], in determining that J & J had established that King's statement about the quality of its work was false, by a preponderance of the evidence. [***Appendix***, p. 74a]. The court also found that "the statement that J & J Construction could not finish a job on time was in fact a false statement." [***Appendix***, p. 75a]. Defendants have not challenged the sufficiency of the evidence underlying either of these findings in this appeal.

b. King's defamatory statements were unprivileged.

Regarding the second element – that the statements were unprivileged – the trial court reviewed each of the privilege claims raised by Defendants. First, Defendants' asserted privilege

under the ***Noerr-Pennington*** doctrine[8] was properly assessed and rejected on the ground that King's defamatory statements had not been made as part of an effort to urge legislative or regulatory policy decisions. Rather, the statements were unprotected because they were made merely "in an effort to get the city to have a particular contractor removed from a particular job." [***Appendix***, p. 79a].

The trial court also rejected Defendants' claim of qualified privilege (whether under either a "petitioning" or "labor dispute" rationale) because it concluded that the privilege applied only where the plaintiff was a public figure or public official, and specifically found that J & J Construction was nothing other than a private figure. [***Appendix***, p. 79a]. Again, Defendants do not challenge the trial court's finding of fact regarding J & J Construction's status as a private figure.[9]

c. King's defamation was at least negligent.

Having found that King's statements were false and unprivileged, and J&J Construction was a private figure, the trial court held Defendants were liable for defamation under ***MCL §600.2911(7)***:

> An action for libel or slander shall not be brought based upon a communication involving a private individual unless the defamatory falsehood concerns the private individual and was published negligently. Recovery under this provision shall be limited to economic damages including attorney fees.

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[8] ***Eastern RR President's Conference v Noerr Motor Freight, Inc***, 365 US 127; 81 SCt 523; 5 LEd 2d 464 (1960); ***United Mine Workers v Pennington***, 381 US 657; 85 SCt 1585; 14 LEd 2d 626 (1965).

[9] The trial court also rejected Defendants' argument that the defamation was privileged under federal labor law. As discussed below, Defendants have not raised that issue before this Court.

Because Defendants were not entitled to a qualified privilege, the trial court did not need to determine whether King's defamatory statements were made with malice – with knowledge or reckless disregard of their falsity. Defendants' negligence was sufficient for liability under ***MCL §600.2911(7)***. However, the factual findings made by the court unquestionably support the conclusion that King's false statements were not only made negligently, but also with knowing disregard as to their falsity.[10]

The trial court noted that King was an experienced bricklayer, "familiar with the way in which...masonry contracts in particular were carried out." [***Appendix***, p. 80a]. King did no investigation, however, to determine whether the work done by J & J Construction on the Novi job was in compliance with the construction manager's directions and standards. [***Appendix***, p. 81a]. The court also found that there was *no basis* for King's statements that J & J Construction had insufficient manpower to complete a job on time, and that King had failed to check with the union contractor to whom J & J Construction had subcontracted some work to determine whether lack of manpower had anything to do with the subcontract. [***Appendix***, p. 83a].

Regarding the photographs, the trial court specifically credited Ehlert's testimony that they were not accurate representations of the work, and found that the photographs were not

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[10] Although the trial court was not required to find anything more than negligence, its opinion determined that King had in fact told J & J Construction's foreman, Brazen, that the Novi job "turned out nice" on the very day he took the photographs. [***Appendix***, p. 82a]. King's subsequent statements and presentations of these photographs to Wayne city officials as examples of *faulty* workmanship demonstrate his knowing mendacity. This is further confirmed by the fact that one month *after* his presentation, he again contradicted himself, telling Gerald Snyder that J&J "does good work". [***Appendix***, p. 66a]. Also, the photographs were selectively framed and intentionally cropped to present a misleading picture regarding the quality of the work. As an experienced bricklayer, King had to know that he was presenting a false and misleading depiction of J & J's work. The facts found by the trial court support the conclusion of at least reckless disregard, if not actual knowledge of falsity.

accurate, but in fact misleading. [***Appendix***, p. 82a-83a]. The court's opinion also found that the photographs "do in fact depict a minuscule portion" of the Novi project. [***Appendix***, p. 80a]. Viewing the facts in totality, the court found that King's defamatory statements and presentation of photographs to the Wayne City Council was at least negligent. [***Appendix***, p. 83a].

d. J & J Construction suffered damage from King's defamation.

The trial court found that King's defamatory statements caused J & J Construction to lose the profits it would have earned on the Wayne Aquatic Center contract, meeting the fourth element of a defamation claim. Defendants have not appealed from the trial court's finding of the existence or amount of damages suffered by J & J Construction.

2. INTENTIONAL INTERFERENCE CLAIM.

Based on the finding that King's statements constituted defamation, the trial court concluded that J & J Construction had also established the four elements of an action for intentional interference with business relationship or expectancy. That contracts were being sought by J & J with the cities of Wayne and Westland was undisputed, as was the fact that King knew of J & J Construction's expectancy. [***Appendix***, p. 86a].

The trial court found that the third element, an intentional or improper interference, was satisfied by King's act of defamation. [*Id*]. Damages were found in the loss of the Wayne contract. [***Appendix***, p. 87a]. Defendants do not contest any of the trial court's findings and conclusions regarding establishment of J & J Construction's claim for intentional interference in this Court.

The trial court impliedly considered and rejected Defendants' argument that J & J Construction's action for intentional interference was preempted by federal labor law. The trial court determined, in regard to the defamation claim, that there was no "labor dispute" which

would invoke federal law. Further, the trial court had determined that King's conduct did not constitute privileged petitioning under the ***Noerr-Pennington*** doctrine.

3. AWARD OF ATTORNEY FEES.

The trial court awarded J & J Construction its reasonable attorney fees, under the defamation statute, ***MCL 600.2911(7)***. The amount or reasonableness of the fees awarded have not been challenged by Defendants.

B. THE COURT OF APPEALS OPINION.

Defendants appealed from the trial court's Judgment. In an opinion issued on May 11, 2001, the Court of Appeals: 1) held that Defendants were immune from liability for tortious interference with J & J Construction's business expectancy under the ***Noerr-Pennington*** doctrine, and reversed the trial court judgment for Plaintiff under that claim; 2) held that J &J's claims were not preempted by federal labor law; and 3) held that J & J, even though a private figure, could not recover damages for Defendant's defamatory statements to a governmental entity absent a finding of "malice," *i.e.*, that Defendants made the statements knowing them to be false or with reckless disregard for their truth or falsity. Because the trial court had found that J & J Construction had established negligence, but had not specifically decided whether Defendants' statements were made with "actual malice," the panel remanded the defamation claim.

The opinion recognized that this Court had established, in ***Rouch***, that "[o]rdinary negligence is sufficient in proving a case of defamation of a private figure in Michigan." [***Appendix***, p. 103a]. The panel acknowledged but dismissed, with almost palpable indifference, the prior Court of Appeals' direct holding, in ***Hodgins***, that there is no qualified privilege for defamation of private figures, even in the context of Petition Clause activity. [***Id.***] There was not

a single reference to the Legislature's allocation of the respective burdens for private and public defamation plaintiffs, set forth in ***MCL 600.2911(6)*** and ***(7)***. Ignoring established judicial and statutory authority, the panel proceeded to forge its own rule of law for private figure defamation cases.

As the springboard for its unwarranted jurisprudential activism, the panel based its decision on a pointedly slanted interpretation of the facts established at trial, in what seemed to be an attempt to place Defendants' conduct in the most favorable light possible. While the opinion begins by stating that the "material facts are not in dispute," the panel proceeds to adopt Defendants' characterizations of the evidence, ignoring the trial court's specific and unchallenged[11] factual findings.

The opening paragraph of the panel's recitation of facts sets the tone for its entire opinion, stating that King "appeared before the city council and *expressed doubts* concerning whether plaintiff performed quality work." [***Appendix***, p. 96a (emph. added]. King did not "express doubt" about J & J Construction's workmanship: the trial court specifically rejected this claim at trial and found that King made declaratory statements that J & J did poor work and could not complete jobs on time. [***Appendix***, p. 85a].

The panel recited that King had taken the photographs discussed above "for the purpose of showing shortcomings in craftsmanship," and that King regarded them as "indicative of poor workmanship." [***Appendix,*** p. 97a]. This characterization can be nothing other than an attempt to paint King's motivation as favorably as possible. It ignores the trial court's finding that the

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[11] Defendants' appeal was limited to the trial court's legal conclusions on their defenses of privilege. Defendants did not appeal from or challenge the trial court's factual findings, and raised no argument that those findings were not supported by the evidence presented at trial.

photographs were not an accurate representation of J & J's work, and its crediting of Ehlert's testimony that the photographs were in fact misleading. [***Appendix***, p. 73a, 81a-82a].

King did not make a "suggestion" that J & J might not be able to finish the job on time. [***Appendix***, p. 97a]. The trial court found that King made a "statement that J&J Construction could not finish a job on time [that] was in fact a false statement. [***Appendix***, p. 75a].

The panel's slanting of the record continues into its discussion of Defendants' claim of immunity from liability for interference with J & J's business expectancy, stating that Defendants' claim the trial court erred in finding them liable "as a result of defendants' use of *misleading* statements" to persuade the City of Wayne not to award the contract to J & J. [***Appendix***, p. 98a]. The trial court did not find King's statements to be simply "misleading": it found that they were false and defamatory.

Both at trial and before the Court of Appeals, Defendants attempted to characterize King's statements as mere questions or statements of opinion, which could not be actionable. The trial court left no doubt on that matter, however:

> I do find that the comments that were made were not merely questions that were raised nor were they merely opinions stated, but they were defamatory statements, they were made as I find as declaratory statements made with the intention of preventing the plaintiff from getting the contract.

[***Appendix***, p. 85a].

In repeatedly softening the import of King's statements, the Court of Appeals panel impermissibly departed from the findings of the trial court. Its language suggests that the panel was attempting to minimize the wrongful nature of Defendants' conduct in order to justify depriving J & J Construction of the protection provided by the Legislature and this Court against defamation and intentional interference with legitimate business expectancies.

C. LEAVE TO APPEAL TO THIS COURT.

On May 31, 2001, J & J Construction filed its Application for Leave to Appeal to this Court. Defendants did not file an application for leave to appeal as a cross appellant. Accordingly, the issues presented to this Court are limited to those raised in J & J Construction's Application. ***MCR 7.302(F)(4)(a)***; ***Peisner v Detroit Free Press***, 421 Mich 125, 129, n 5; 364 NW2d 600 (1984).

By Order dated April 30, 2002, this Court granted the Application for Leave to Appeal.

IV. ARGUMENT

A. STANDARD OF REVIEW.

Although it relied to a great extent on Defendants' slanted and inaccurate version of the facts, the Court of Appeals did not reverse any factual findings by the trial court. Its reversal of the judgment awarded to J & J Construction by the trial court was based entirely on its resolution of legal issues. "This Court reviews questions of law under a de novo standard of review." ***Byker v Mannes***, 465 Mich 637, 643; 641 NW2d 210 (2002), citing ***Kelly v Builders Square Inc***, 465 Mich 29, 34; 632 NW2d 912 (2001).

The ***de novo*** standard of review applies to all issues presented in this case.

B. THE COURT OF APPEALS CLEARLY ERRED IN RULING THAT DEFAMATORY STATEMENTS REGARDING A PRIVATE FIGURE ARE SUBJECT TO A QUALIFIED PRIVILEGE WHEN MADE IN THE CONTEXT OF PETITIONING UNDER THE FIRST AMENDMENT.

1. SUMMARY OF ARGUMENT.

The Court of Appeals, in extending the ***New York Times v Sullivan*** qualified privilege protection to defendants engaged in petitioning activity even where defamatory statements are made regarding a *private* figure, has elevated the Petition Clause above all other First

Amendment guarantees. This decision clearly conflicts with established United States Supreme Court precedent as well as Michigan law. To reach its conclusion, the panel overruled ***Hodgins Kennels, Inc v Durbin***, 170 Mich App 474; 429 NW 2d 189 (1988), ***rev'd in part*** 432 Mich 894; 438 NW2d (1989), ***sub silentio***, and employed a tortuous misreading and misconstruction of ***McDonald v Smith***, 472 US 479; 105 S Ct 2787; 86 L Ed 2d 384 (1985).

The panel implicitly acknowledged that the prior Court of Appeals holding in ***Hodgins*** requires a completely contrary result but chose, without explanation, to ignore this decision. Instead, the panel engaged in a convoluted analysis of the United States Supreme Court decision in ***McDonald*** in an attempt to support its holding. The panel's analysis stretches the holding in ***McDonald*** clearly beyond its intended meaning to reach a conclusion which was expressly rejected in ***Hodgins***.

2. CONTRARY TO THE PANEL'S OPINION, *MCDONALD V. SMITH* DOES NOT REQUIRE APPLICATION OF THE QUALIFIED PRIVILEGE/ACTUAL MALICE STANDARD TO DEFAMATION ACTIONS INVOLVING FIRST AMENDMENT PETITIONING ACTIVITY.

The panel specifically recognized that ***McDonald*** involved a claim of defamation brought by a *public* figure who had applied for the position of United States attorney. The plaintiff in ***McDonald*** alleged that the defendant had defamed him in letters written to President Reagan opposing his selection. The panel also recognized that under prior United States Supreme Court precedent in ***New York Times Co v Sullivan***, 376 US 254; 84 S Ct 710; 111 L Ed 2d 686 (1964), the First Amendment prohibits a *public* figure from recovering damages caused by a defendant's statement unless he proves that the statement was made with "actual malice;" that is, that the defendant knew the statement was false or acted in reckless disregard of whether it was false.

In ***McDonald***, the defendant contended that statements made in the course of petitioning government are absolutely privileged and immune from liability for defamation. The Court rejected the contention, holding that defamatory petitioning was not absolutely privileged but lay within the reach of the law of libel. However, because the plaintiff was undisputedly a public figure, the Court went on to hold that under ***New York Times*** and North Carolina state court decisions a qualified privilege attached, and the plaintiff had to prove "actual malice:"

> Under *state common law*, damages may be recovered only if petitioner showed to have acted with malice; "malice" has been defined by the Court of Appeals of North Carolina, in terms that court considered consistent with ***New York Times Co. v. Sullivan***, 376 US 254, 11 L Ed 2d 686, 84 S CT 710 (1964), as "knowledge at the time that the words are false, or . . . without probable cause or without checking for truth by the means at hand." ***Dellinger v Belk***, 34 NC APP 488, 490, 238 SE2d 788, 789 (1977).

McDonald, 47 US at 485 (emph added).

Ignoring the crucial fact that the plaintiff *was* a public figure, the panel patently misconstrued the holding of ***McDonald*** by extending the qualified privilege to a private figure:

> Because the Court referred to "state common law," as opposed to the body of federal law that gave rise to the distinction between public and private figures, the Court's reference to ***New York Times Co v Sullivan*** appears to invoke not its public-private-figure dichotomy but instead its standard of known falsehood or reckless disregard of the truth.

[***Appendix***, p. 105a].

This reading of ***McDonald*** is wrong. The panel's guess at what ***McDonald*** "appears" to require was without any basis in either the language or reasoning of the Court's opinion. ***McDonald*** does not in any way state or imply that a qualified privilege should apply where a private figure is defamed in the course of petitioning activity. Because it was undisputed that the

plaintiff in ***McDonald*** was a public figure, the Court simply had no occasion to address the level of proof required of a private figure. Its silence on the issue cannot reasonably be interpreted as a rejection of the private-public distinction established eleven years earlier in ***Gertz v Robert Welch, Inc***, 418 US 323; 94 S Ct 2997; 41 L Ed 2d 789 (1974).

The "state common law" reference in ***McDonald*** quoted by the panel relates to the Supreme Court's citation to the North Carolina state court decision of ***Dellinger v Belk***, 34 NC App 488; 238 SE2d 788 (1977) rev den 294 NC 182; 241 SE2d 517 (1978). The ***Dellinger*** decision does not support the panel's conclusion. In fact, ***Dellinger*** had nothing to do with petition clause activity. Rather, ***Dellinger*** stands for the proposition that where the plaintiff is a public official, the plaintiff must show actual malice under the ***New York Times*** standard. It was this "state common law" requiring an actual malice standard when the plaintiff is a public official that the ***McDonald*** court was referring to. Contrary to the panel's conclusion, there is no North Carolina common law decision requiring application of the actual malice standard where there is petitioning activity.

This is made clear by the original district court opinion, ***Smith v McDonald***, 562 F Supp 829 (MD NC 1983). There, the court held that under state common law, communications regarding the qualifications of candidates for public office – *i.e.* public figures -- are entitled to a qualified privilege. There was no statement or indication that the qualified privilege standard applied because "petitioning" activity was present. The cases cited by the district court as authority for this proposition included ***Dellinger*** and several other state court opinions, all of which involved the public figure/qualified privilege fact pattern, and did not

relate to petitioning activity.[12] Thus, there is nothing in ***McDonald*** that supports the panel's conclusion.

3. NOTHING IN *NEW YORK TIMES V SULLIVAN* SUPPORTS THE PANEL'S CONCLUSION THAT DEFAMATORY PETITIONING IS ENTITLED TO GREATER CONSTITUTIONAL PROTECTION OR REQUIRES PROOF OF ACTUAL MALICE.

The panel stated its rationale for creating a new standard for defamatory petitioning as follows: "the [***McDonald***] Court's reference to ***New York Times*** appears to invoke . . . its standard of known falsehood or reckless disregard of the truth." [***Appendix***, p. 105a]. This is a *non sequitur*. The ***New York Times*** decision does not bear on the issue whether a qualified privilege attaches to petitioning where the plaintiff is a private figure. ***New York Times*** did not even address Petition Clause activity: it held that defamatory statements regarding *public officials* are insulated from liability by the First Amendment guarantees of freedom of speech and freedom of the press unless it is shown that the defendant acted with "actual malice." The panel's reference to the ***New York Times*** decision as the basis for its holding was clearly erroneous.

4. THE PANEL HAS MADE NEW LAW AND ITS DECISION SQUARELY CONFLICTS WITH *HODGINS KENNELS* AND *MCL 600.2911*.

In ***Hodgins***, the Court of Appeals held that ***McDonald*** does not support the very proposition espoused by the panel below. Rejecting the defendants' assertion that they were protected by a qualified privilege to defame under the Petition Clause, the court in ***Hodgins*** stated:

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[12] ***See Angel v Ward***, 43 NC App 288; 258 SE2d 788 (1979) (IRS agent is a public official and therefore New York Times qualified privilege applies); ***Ponder v Cobb***, 257 NC 281; 126 SE2d 67 (1962); ***Alexander v Vann***, 180 NC 187; 104 SE 360 (1920); ***Ramsey v Cheek***, 109 NC 270; 13 SE 775 (1891).

> Defendants misperceive the import of the ***McDonald*** decision. They assert that this case stands for the proposition that a qualified privilege exists for petition clause activity pursuant to which a plaintiff must prove constitutional malice. It was the ***McDonald*** case itself in which constitutional malice had to be proven, for the plaintiff was a public figure.
>
> In the present case, plaintiffs were not public officials. Defendants therefore had no qualified privilege regarding alleged defamatory statements made about them, *even if* all the statements at issue had been directed to petition clause activity in attempts to influence legislation....

170 Mich App at 194-195 (*emph added*).[13]

Hodgins clearly holds that even if defamatory statements were made in the course of petitioning activities to influence legislation, a private figure plaintiff need only establish that the defendant acted negligently with regard to the statements. ***Hodgins*** rejected the precise ruling of the panel below, holding that a qualified privilege does not attach to defamatory statements made concerning a private party in the course of petitioning a government body. Under ***MCL 7.215(C)(2)***, ***Hodgins*** "has precedential effect under the rule of stare decisis." As this Court has held, a court should depart from established precedent "[o]nly in the rare case when it is clearly apparent that an error has been made, or changing conditions result in injustice by the application of an outmoded rule...." ***Parker v Port Huron Hospital***, 361 Mich 1, 10; 105 NW2d 1 (1960).

Although the panel recognized the above holding in ***Hodgins***, its opinion neither expressly acknowledged that it was overruling, nor offered any explanation for its abrupt

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[13] In ***Hodgins***, the Court of Appeals rejected the defendants' claim of "petitioning" qualified immunity, but reversed the jury verdict in favor of the plaintiff on the ground that the instructions given by the trial court permitted the jury to find liability without *any* fault. Leave to appeal was sought. In lieu of granting the applications, this Court reversed on the ground that defendants had not preserved the issue regarding the instructions and the jury's finding of conspiracy established that there was no manifest injustice from the failure to instruct on fault, and reinstated the trial court judgment. The Court was presented with the opportunity to review the Court of Appeals' ruling on the qualified immunity issue, but saw no need to do so.

departure from, the holding of the case. It did not determine that "an error ha[d] been made," or that the holding in ***Hodgins*** was "outmoded" and would result in injustice due to "changing conditions." Instead, the panel seized on inapposite language contained in the ***McDonald*** decision regarding the requirements of North Carolina state law applicable to public figures, and jumped to the conclusion that the ***New York Times*** decision "appear[ed] to" require the application of a qualified privilege where defamation of a private figure was made in the course of petitioning activity. This analysis makes no sense and is legally unsupportable.

The Eighth and Fourth Circuits are in accord with ***Hodgins***. In ***In Re: IPB Confidential Business Documents Litigation***, 797 F2d 632 (CA 8, 1986) (*en banc*), 800 F2d 787 (CA 8, 1986) (rehearing *en banc*), ***cert denied*** 479 US 1088; 107S Ct 1293; 94 L Ed 2d 150 (1986), a panel of the Eighth Circuit initially reached the same conclusion as the Court of Appeals panel in this case, holding that plaintiffs must prove that statements made in the course of petitioning were made with knowledge that they were false or a reckless disregard of their falsity. The plaintiff sought rehearing on *en banc*, claiming that the Eighth Circuit panel "grievously misread" the Supreme Court's opinion in ***McDonald***.

In two separate *enc banc* rehearings, the Eighth Circuit agreed and held that where defamatory statements were made in the course of petitioning and the plaintiff is not a public official or figure, the qualified privilege/actual malice standard does not apply. The Eighth Circuit, sitting *en banc*, stated:

> Flowing from the Supreme Court's discussion in ***McDonald***, we hold that in the area of defamation, First Amendment petitioning is protected by the same constitutional principles identified by the Supreme Court as applicable in other cases involving defamatory first amendment speech. More specifically, we conclude that the principles embodied in such cases as ***New York Times Co v Sullivan***, [citation omitted], and ***Gertz v Robert Welch Inc***,

> [citation omitted], are fully applicable to the present controversy.
>
> * * *
>
> Since its decision in ***New York Times***, the Supreme Court has sought an appropriate balance between two important yet often conflicting interests: (1) the interest in assuring vigorous and robust debate on public issues, and (2) the interest in protecting the reputation of each individual from unjustified defamatory attacks. As the principles intended to protect these interest have been shaped and defined, the Supreme Court has made clear that to identify the appropriate level of protection applicable in a particular case, a Court must focus on its inquiry on the question of whether the person defamed is a public official, a public figure or a private figure.

In re IBP, 797 F 2d at 642.

The Eighth Circuit then analyzed the ***New York Times*** decision stating that public officials and public figures could not recover in defamation unless they proved that the challenged statement was made with actual malice. The court held that in the ***Gertz*** decision, the Supreme Court made it clear that private individuals claiming that they had been defamed by First Amendment speech need only prove fault or negligence in order to recover actual damages. Since the plaintiff in the case before it was a private figure, the Eighth Circuit held that a negligence standard applied, even though the defendant's defamatory statements were made in the course of "petitioning" activity.

Similarly, in an unpublished opinion, the Fourth Circuit rejected an argument that the qualified privilege/actual malice standard should apply where a private figure was allegedly defamed in the course of petitioning activity. In ***Dobkin v John Hopkins University***, 172 F3d 43 (CA 4, 1999) (1999 US App LEXIS 725), ***cert denied*** 528 US 875; 120 Sct 181; 145 L Ed 2d 153 (1999),[14] the court stated:

> The Dobkins are not afforded the greater protection of the actual malice standard simply because they argued the Petition Clause.

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[14] A copy of the ***Dobkin*** opinion is included in Appellant's Appendix.

> Rather, in accordance with other defamatory First Amendment cases, only if Dr. German and Ms. Fishbein qualify as public figures must they prove actual malice. A public figure must show actual malice to recover damages. ***New York Times Co v Sullivan***....
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> * * *
>
> Therefore, Dr. German and Ms. Fishbein are not public figures and need not prove the Dobkins acted with actual malice.

Dobkin, 1999 US App LEXIS, p. 17.

The Court of Appeals opinion also squarely conflicts with the provisions of the Michigan defamation statute, ***MCL 600.2911***. In the defamation statute, the Legislature has specifically addressed the privileges which are to be applied. Thus an absolute privilege is granted for the publication or broadcast of a fair and true report of matters of public record, public and official proceedings, governmental reports or notices and the acts of public bodies. ***MCL 600.2911(3)***.

The statute also specifically grants a qualified privilege for defamatory communications regarding public officials and public figures, requiring a plaintiff in such cases to prove, by clear and convincing evidence, that the defamatory statement was made with knowledge of its falsity or reckless disregard of its truth or falsity. ***MCL 600.2911(6)***. The Legislature did not, however, extend the qualified privilege to communications about a private figure, in any circumstances. Rather, the statute requires that an action may be brought by a private figure only where the defamatory statement was "published negligently." ***MCL 600.2911(7)***.

The Legislature amended the defamation statute in 1988, three years after the ***McDonald*** decision was announced, and some months after the Court of Appeals' ***Hodgins*** decision. The Legislature is "deemed to act with an understanding of common law in existence" at the time it enacts a statute. ***Nation v WDE Elec Co***, 454 Mich 489, 494; 563 NW2d 233 (1997). When it amended ***MCL 600.2911***, the Legislature "must be presumed to have been aware of [***McDonald*** and

Hodgins] and to have felt no need to modify the bill to exclude [***McDonald*** and ***Hodgins***] from its scope." ***Li v Feldt***, 439 Mich. 457, 472; 487 NW2d 127 (1992). The Court of Appeals' expansion of qualified privilege in this case is in direct contravention of the language and intent of ***MCL 600.2911***, and must be rejected.

The panel's decision is in direct conflict with, and effectively overrules, the Court of Appeals' prior decision in ***Hodgins*** and the enactment of the Legislature. Its opinion offers no reason for its failure to adhere to principles of stare decisis in ignoring prior precedent, nor can any be found in analogous federal cases. Neither ***McDonald*** nor ***New York Times*** can be read to support the panel's conclusion.

5. THE COURT OF APPEALS' OPINION SPLINTERS FIRST AMENDMENT RIGHTS AND, CONTRARY TO THE INSTRUCTIONS OF THE UNITED STATES SUPREME COURT, CREATES HIGHER AND SPECIAL PROTECTION FOR SOME FIRST AMENDMENT FREEDOMS THAN OTHERS.

The Court of Appeals' decision elevates Petition Clause activity to special First Amendment status. The decision requires a private figure defamation plaintiff to establish that the defendant acted with actual malice whenever the defendant is engaged in petition activity. This decision places petitioning activity in a special category not enjoyed by other First Amendment guarantees of free speech and free press. The opinion below provides no sound basis for departing from established United States Supreme Court precedent and tilting the balance of First Amendment protections in this direction

The First Amendment provides that Congress shall make no law prohibiting the free exercise of religion or "abridging the freedom of speech, or of the press; or of the right of the people to peaceably assemble, and to petition the government for a redress of grievances." The Supreme Court has made it clear that no one of these rights is entitled to greater protection than any other. The

"right to petition is cut from the same cloth as the other guarantees of that amendment...." ***McDonald***, 472 US at 482.

Various United States Supreme Court and Michigan Supreme Court decisions have interpreted the balance between First Amendment constitutional protections and the law of defamation. Where the plaintiff is a public figure, these opinions have struck the balance in favor of First Amendment protection and require the plaintiff to shoulder the heightened burden of qualified privilege. In cases where the plaintiff is a private figure, the courts have held that there is no sound constitutional justification to require the plaintiff to meet the heightened burden; a negligence standard is sufficient. In its ruling, the panel below has clearly deviated from this established constitutional doctrine.

By holding that petition clause activity is entitled to heightened protection in a defamation action, the Court of Appeals has granted this First Amendment guarantee greater protection than that afforded freedom of the press. This clearly violates the rule of ***McDonald***, which refused to "elevate the Petition Clause to special First Amendment status." 472 US at 485. The ***McDonald*** Court stated:

> The Petition Clause, however, was inspired by the same ideals of liberty and democracy that gave us the freedoms to speak, publish and assemble. *See* ***Mineworkers v Illinois Bar Assn.***, 389 US 217, 222; 88 S Ct 353; 19 L Ed 2d 426 (1967). These First Amendment rights are inseparable. ***Thomas v Collins***, 323 US 516, 530; 65 S Ct 315; 89 L Ed 430, (1945), and there is no sound basis for granting greater constitutional protection for statements made in a petition to the President than other First Amendment expressions.

472 US at 485. *See also,* ***Thorne v Bailey***, 846 F2d 241 (CA 4) ***cert den*** 488 US 984; 109 S Ct 538; 102 L Ed 2d 569 (1988) ("the Petition Clause does not enjoy a special status among First Amendment guarantees" . . . "We reject Thorne's argument that the Petition Clause enjoys a

'preferred place' among First Amendment freedoms.")

A review of Supreme Court decisions confirms that the Court of Appeals violated these sound constitutional principles. The United States Supreme Court has held on two occasions, and the Michigan Supreme Court has held on a third, that no qualified privilege attaches where the First Amendment activities of a free press result in defamation of a private figure. *See* ***Gertz v Welch***, ***supra***; ***Philadelphia Newspapers, Inc. v Hepps***, 475 US 767; 106 S Ct 1558; 89 L Ed 2d 783 (1986); ***Rouch v Enquirer & News of Battle Creek***, 427 Mich 157; 398 NW2d 245 (1987).

In ***Gertz v Welch***, the Supreme Court held that the First Amendment-based qualified privilege afforded a free press and the news media in defamation suits brought by public persons should not be extended to defamation suits brought by private individuals, even where the defamatory statements concern an issue of public or general interest. Finding that "there is no constitutional value in false statements of fact," the ***Gertz*** Court held: "[n]either the intentional lie nor the careless error materially advances society's interest in "uninhibited, robust, and wide-open debate on public issues." 418 US at 340.

The Court stated that the First Amendment requires protection of some falsehood in order to "protect speech that matters." The Court also recognized that, "some tension necessarily exists between the need for a vigorous and uninhibited press and a legitimate interest in regressing wrongful injury." However, where a defamation plaintiff is a private figure, the Court determined that the balance should tip in favor of redressing the injury even where the First Amendment guarantee of freedom of the press is at issue:

> For the reasons stated below, we conclude that the state interest in compensating injury to the reputation of private individuals require that a different rule should obtain with respect to them.

Gertz, 418 US at 343.

Gertz recognized a legitimate need to distinguish between public and private figures for purposes of First Amendment protection in defamation actions. The Court noted that a public figure has thrust himself into public affairs and must accept certain consequences of that involvement. In contrast, a private figure has not accepted public office or assumed an influential role in society:

> He has relinquished no part of his interest in the protection of his own good name, and consequently has a more compelling call on the Courts for redress of injury inflicted by defamatory falsehood. Thus, private individuals are not only more vulnerable to injury than public officials and public figures; they are more deserving of recovery.
>
> For these reasons, we conclude that the state should retain substantial latitude in their efforts to enforce a legal remedy for the defamatory falsehood injurious to the reputation of a private individual. The extension of the ***New York Times*** test . . . would abridge this legitimate state interest to a degree that we find unacceptable.

418 US at 345-346.

The ruling in ***Gertz*** was reaffirmed by the Supreme Court in ***Philadelphia Newspapers, Inc. v. Hepps***. The Court again weighed the First Amendment values inherent in a free press against the rights of a private individual in his reputation and good name. As in ***Gertz***, the Court struck the balance in favor of compensating private individuals and not imposing a higher qualified privilege/actual malice standard of liability, even where a media defendant and the rights of a free press are involved. The Court held that a plaintiff who is a private figure bears the burden in a defamation case of proving that these statements, protected by the First Amendment, are false and that they were published negligently.

Both ***Gertz*** and ***Hepps*** did afford some protection for defendants engaged in First Amendment activity who are charged with defamation. The Court held that although a private plaintiff need only show that the defamatory statements were published negligently, such a plaintiff was entitled to compensation only for the actual injury. Recovery of presumed or punitive damages

could not be obtained absent a showing of knowledge of falsity or reckless disregard of the truth.[15]

The decisions in ***Gertz*** and ***Philadelphia Newspapers*** were adopted by this Court in ***Rouch v Enquirer and News of Battle Creek***, 427 Mich 157; 398 NW2d 245 (1987). This Court held that the common law "public interest privilege," formerly recognized in Michigan, has been largely subsumed by federal constitutional law requiring a distinction between public and private figures developed in ***Gertz*** and ***Philadelphia Newspapers***. In ***Rouch***, this Court held that in an action for defamation involving a private figure plaintiff, where the speech at issue is of public concern, negligence is the applicable standard for determining liability, even where the defendant is engaged in freedom of the press activities.

Justice Brickley's opinion first set forth a thorough review of applicable constitutional law, then recognized that private individuals are more deserving of protection from defamation because they are "less likely to receive public attention and comment." 427 Mich at 191, quoting ***Foster v Laredo Newspapers, Inc.***, 541 SW2d 809, 819 (TX, 1976). This Court noted that other courts have said that offering the protection of privilege to all matters of public interest is "too broad an extension of the 'free press privilege'." 427 Mich at 194. In adopting the ***Gertz*** standard, Justice Brickley stated for this Court:

> We believe that the United States Supreme Court has ably defined and provided for the protection necessary to ensure free and open debate of public issues.
>
> * * *
>
> [We] first announce our value judgment that reputational interests are as important today, if not more so, as when the common law first recognized defamation as a tort. In an organized and centralized society, where at least economic relationships are likely to be based on an impersonal or reputational

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[15] The trial court here specifically based its calculation of damages on its assessment of the actual damages suffered by Plaintiff.

> level as opposed to the more decentralized and personal approach characteristic of a by-gone era, how we are perceived takes on greater significance. For better or worse, in today's world, most of us are known by our images.
>
> Secondly, it is obvious that the policy imperatives that led to the adoption of many of the qualified privileges, including the public-interest privilege, resulted from the then-existing harshness of the law of libel in the absence of any constitutionally based privilege. As described above, that harshness has been removed.
>
> Finally, while reliance on rhetorical pronouncements and the speculation about "self censorship" and "breathing room" are necessary to protect first amendment freedoms, we look more to empirical evidence in search of a justification for sacrificing the tort-law protection for one defamed.
>
> * * *
>
> The compelling reasons for the qualified public interest privilege are now being served by heightened constitutional standards. The need to further sacrifice tort recovery for false defamation of a private person resulting from negligence has not been shown. Thus, we adopt the ***Gertz*** standard in place of the former public interest privilege and hold that this [private figure] plaintiff was not required to show malice on the part of the defendant.

427 Mich at 200-203.[16]

The Michigan legislature has adopted and codified the ***New York Times*** and ***Gertz*** standards. In so doing, the legislature recognized that the guarantees of the First Amendment are adequately protected by the public/private figure distinction. Under ***MCL 600.2911***, private figures need only show negligence even where the defamation material is published by the new media acting under the umbrella of the First Amendment:

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[16] ***See also, Lakeshore Comm Hosp, Inc v Perry***, 212 Mich App 396, 402; 538 NW2d 24 (1995): "Where the plaintiff is a private figure, the qualified privilege protecting defendants by requiring a showing of actual malice does not apply, even if the private-figure plaintiff was defamed in the course of a discussion of an issue of public concern. Instead, private figures may recover, despite the defendant's First and Fourteenth Amendment rights, upon a showing that the defendant's statement was made negligently."

> (6) An action for libel or slander shall not be brought based upon a communication involving public officials or public figures unless the claim is sustained by clear and convincing proof that the defamatory falsehood was published with knowledge that it was false or with reckless disregard of whether or not it was false.
>
> (7) An action for libel or slander shall not be brought based upon a communication involving a private individual unless the defamatory falsehood concerns the private individual and was published negligently. Recovery under this provision shall be limited to economic damages including attorney fees.

The foregoing demonstrates that where the injured party is a private figure alleging defamation, neither the Constitution nor state statute requires application of a qualified privilege/actual malice standard even where First Amendment guarantees are at issue. The Supreme Court has made it clear that no single guarantee of the First Amendment is more valuable or more worthy of protection than any other. Accordingly, the Court of Appeals' decision to afford special protection to Petition Clause activity, not shared by public interest speech or the exercise of a free press, is wholly unwarranted and runs counter to United States Supreme Court and Michigan Supreme Court precedent and the dictates of our Legislature.

As stated in ***Rouch***, the harshness of the common law standards of libel have been mitigated by the United States Supreme Court's decisions in ***New York Times*** and ***Gertz***. There is no need to further expand the qualified privilege to protect "petitioning" activities in light of established constitutional protection distinguishing between public and private figures. Nor is any fundamental policy served by creating special protection for petitioning clause activity that does not exist for other First Amendment guarantees.

The Court of Appeals' decision in this case conflicts with and undermines the principles contained in established law of the United States Supreme Court, Michigan Supreme Court and Michigan Court of Appeals decisions. The Panel's reasoning is flawed, the standards cited are

inapplicable, and its analysis is bankrupt.

Under settled law, a defendant who utters defamatory statements about a private figure is not entitled to a qualified privilege even where the defendant is engaged in First Amendment activity including petitioning clause activity. The Court of Appeals clearly erred in holding to the contrary, and the trial court's Judgment should be reinstated.

C. THE COURT OF APPEALS CLEARLY ERRED IN RULING THAT PLAINTIFF'S CLAIM FOR INTENTIONAL INTERFERENCE WITH BUSINESS EXPECTATIONS WAS BARRED BY THE FIRST AMENDMENT PETITION CLAUSE AND THE NOERR-PENNINGTON DOCTRINE .

1. SUMMARY OF ARGUMENT

In reversing the trial court's judgment for tortious interference with Plaintiff's legitimate business expectancy, the Court of Appeals accepted Defendants' argument that they were "engaged in political advocacy that was immune from suit under the ***Noerr-Pennington*** doctrine." [***Appendix***, p. 98a]. This ruling was clearly erroneous in two fundamental respects.

First, as discussed above, the underlying conduct at issue was defamation of a purely private figure, which enjoys no protection under the First Amendment right to petition. Because the *conduct* of Defendants is not constitutionally protected, they cannot be immune from liability for damages which they intended to cause and which actually resulted from that conduct.

Second, Defendants were not engaged in "political advocacy," but were merely attempting to influence the City of Wayne's conduct as a consumer in the marketplace. Because Defendants were not attempting to influence the passage or enforcement of laws or affect public policymaking, their conduct did not constitute "petitioning" within the scope or intent of the First Amendment.

The Court of Appeals construed and applied the ***Noerr-Pennington*** doctrine in a manner which is totally unjustified by the text of or the principles underlying the Petition Clause. In relying

on broad language applicable and appropriate particularly to antitrust actions, the court lost sight of the fact that petitioning immunity arises from the First Amendment, and may extend only to conduct which actually enjoys constitutional protection under that Amendment. Here, the underlying conduct – tortious interference by defamation – enjoys no constitutional protection, and ***Noerr-Pennington*** does not apply.

2. THE COURT OF APPEALS CLEARLY ERRED IN APPLYING NOERR-PENNINGTON TO CONDUCT WHICH IS NOT PROTECTED UNDER THE PETITION CLAUSE OF THE FIRST AMENDMENT.

The First Amendment provides, in pertinent part, that:

> Congress shall make no law...abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, *and to petition the Government for a redress of grievances.*

U S Const, Am I (emph. added).[17]

In ***Eastern RR Presidents Conference v Noerr Motor Freight***, 365 US 127; 81 S Ct 523; 5 L Ed 2d 464 (1961), the Supreme Court held that attempts to influence the passage or enforcement of laws which would have an anticompetitive effect are not actionable in an antitrust suit under the Sherman Act. The Court's decision was principally based on its construction of the Sherman Act:

> It has been recognized, at least since the landmark decision of this Court in **Standard Oil Co. v United States**, that the Sherman Act forbids only those trade restraints and monopolizations that are created, or attempted, by the acts of "individuals or combinations of individuals or corporations." Accordingly, it has been held that where a restrain upon trade or monopolization is the result of valid governmental action, a opposed to private action, no violation of the Act can be made out. These decisions rest upon the fact that under our form of government the question whether a law of that kind should pass, or if passed be enforced, is the responsibility of the appropriate legislative or executive branch of government so long as the law

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[17] It is well settled that the Petition Clause protection extends to petitions to state as well as federal governments, and to all branches – executive, legislative and judicial – and subdivisions of those governments.

itself does not violated some provision of the Constitution.

Noerr, 365 US at 136-137.

The Court reasoned that construing the Act to cover even combinations of individuals from attempting to influence the enactment of laws affecting commerce would impair the ability of government to take actions that might restrain trade. If the government is free to enact such legislation, then holding that individuals cannot inform the government of their wishes regarding such legislation "would impute to the Sherman Act a purpose to regulate, not business activity, but political activity, a purpose which would have no basis whatever in the legislative history of the Act." ***Noerr***, 365 US at 137.

The second ground relied on in ***Noerr*** was that "such a construction would raise important constitutional questions." ***Id.***, 365 US at 137-138.

> The right of petition is one of the freedoms protected by the Bill of Rights, and we cannot, of course, lightly impute to Congress an intent to invade these freedoms. Indeed, such an imputation would be particularly unjustified in this case in view of all the countervailing considerations enumerated above. For these reasons, we think it clear that the Sherman Act does not apply to the activities of the railroads at least insofar as those activities comprised mere solicitation of governmental action with respect to the passage and enforcement of laws.

Noerr, 365 US at 138.

In ***United Mine Workers v Pennington***, 381 US 657; 85 S Ct 1585; 14 L Ed 2d 626 (1965), the Court clarified that attempts to influence governmental action are not actionable under antitrust law, even if motivated by a purpose to further a conspiracy to monopolize or restrain trade. "Noerr shields from the Sherman Act a concerted effort to influence public officials regardless of intent or purpose." ***Pennington***, 381 US at 670.

Neither ***Noerr*** nor ***Pennington*** held that all expressions to governmental agencies, regardless of the form or manner of expression, are immune from liability for damages to third parties directly caused thereby. In neither case, in fact, did the Court attempt to set forth a body of general Petitioning Clause immunity law. Both cases were based on its determination that, based on statutory construction, Congress could not have intended to bring legitimate petitioning activity within the reach of the Sherman Act.

The Supreme Court has not addressed the applicability of ***Noerr-Pennington*** outside the realm of antitrust actions, but several Circuit Courts of Appeal have used the cases as reference points in determining whether petitioning activity is immunized from other causes of action. For example, the Fifth Circuit has stated:

> Although the ***Noerr-Pennington*** doctrine initially arose in the antitrust field, other circuits have expanded it to protect first amendment petitioning of the government from claims brought under federal and state laws, including section 1983 and common-law tortious interference with contractual relations.

Video Intl Productions Inc v Warner-Lambert Cable Communications Inc, 858 F2d 1075, 1084 (CA 5, 1988), ***cert den*** 490 US 1047; 109 S Ct 1955; 104 L Ed 2d 424 (1989).

To state that courts have "expanded" ***Noerr-Pennington*** to embrace non-antitrust cases is putting the cart before the horse, however. Petitioning of government by legitimate means has been protected activity since ratification of the First Amendment. More than 150 years ago, the Supreme Court recognized that a petition to government seeking removal of a public official may be privileged. ***White v Nicholls***, 3 How 266; 11 L Ed 591 (1845).

In ***Cardtoons LC v Major League Baseball Players Assoc***, 208 F3d 885, 889 (CA 10, 2000) ***cert den*** 531 US 873; 121 S Ct 175; 148 L Ed 2d 120 (2000), the Tenth Circuit recognized that referring to petitioning immunity in contexts other than antitrust as ***Noerr-Pennington*** immunity "is

a bit of a misnomer," which can lead to the sort of confusion evidenced in the Court of Appeals decision here. In non-antitrust cases, immunity derives directly and solely from the First Amendment right to petition government, and not from ***Noerr-Pennington***. The court stated:

> This distinction is not completely academic. Antitrust cases that grant ***Noerr-Pennington*** immunity do so based upon *both* the Sherman Act and the right to petition. These precedents, founded in part upon a construction of the Sherman Act, are not completely interchangeable with cases based solely on the right to petition.

Cardtoons, 208 F3d at 890.

The correct principle to be drawn from both the ***Noerr-Pennington*** line of cases and those which have rejected causes of action outside the realm of the Sherman Act is that, where a defendant's conduct constitutes *protected* petitioning, that conduct cannot form the basis for liability. The necessary converse of that principle is that, if the conduct is *not* within the protection of the Petition Clause, there is no constitutional immunity from liability for damages caused by the conduct, regardless of the nature of the cause of action.

3. THE COURT OF APPEALS' DETERMINATION THAT DEFENDANTS ARE IMMUNE FROM LIABILITY FOR INTERFERENCE WITH BUSINESS EXPECTATIONS ACCOMPLISHED THROUGH DEFAMATORY STATEMENTS TO A GOVERNMENT IS CLEARLY ERRONEOUS.

The Court of Appeals held that ***Noerr-Pennington*** provides immunity: 1) from *any* cause of action seeking recovery for injuries arising from petitioning activity; 2) unless the petitioning is actually a "sham." The first conclusion was drawn from *dicta* in ***Azzar v Primebank FSB***, 198 Mich App 512; 499 NW2d 793 (1993) *app den* 443 Mich 858; 505 NW2d 581 (1993), which in itself was an incorrect statement of the law. The second was derived from a reading of ***Azzar*** which finds no support either in the text of that opinion or in common sense.

a. The Petition Clause Does Not Bar All Causes Of Action, But Only Causes of Action Arising From Protected Petitioning.

Azzar involved a claim for breach of fiduciary duty by certain shareholders of the defendant bank based, in part, on the bank's statements to the Federal Home Loan Bank Board (FHLBB) that the plaintiffs had provided incomplete information to the FHLBB. The FHLBB then issued a ruling which effectively barred the plaintiffs from purchasing additional stock in the bank. The trial court found that the defendants' statements to the governmental agency constituted an attempt to influence governmental action that was protected by the First Amendment, for which they were immune from liability for resulting damages to the plaintiff.

The ***Azzar*** panel recognized that the right to petition is guaranteed by the First Amendment, and that ***Noerr*** held that even knowing infliction of injury from petitioning does not itself render that petitioning illegal. After noting that ***Noerr-Pennington*** has been applied principally in antitrust actions, the panel went on to make the broad statement:

> However, the ***Noerr-Pennington*** doctrine is a principle of constitutional law that bars litigation arising from injuries received as a consequence of First Amendment petitioning activity, regardless of the underlying cause of action asserted by the plaintiffs. ***Webb v Fury***, 167 W Va 434; 282 SE2d 28 (1981).

Azzar, 198 Mich App at 517.

Because ***Azzar*** involved only a claim for breach of fiduciary duty, its broad statement is clearly *dicta* without precedential value. As this Court noted in ***Breckon v Franklin Fuel Co***, 383 Mich 251; 174 NW2d 836 (1970), quoting Chief Justice Marshall in ***Cohens v Virginia***, 19 US 264, 5 LEd 257; 6 Wheat 264 (1821):

> It is a maxim not to be disregarded, that general expressions, in every opinion, are to be taken in connection with the case in which those expressions are used. If they go beyond the case, they may be respected, but ought not to control the judgment in a subsequent suit, when the very point is presented for decision. The reason of this maxim is obvious. The question

> actually before the court is investigated with care, and considered in its full extent. Other principles which may serve to illustrate it, are considered in their relation to the case decided, but their possible bearing on all other cases is seldom completely investigated.

383 Mich at 267.

Moreover, the statement in ***Azzar*** was quoted from the opinion of the Supreme Court of Appeals of West Virginia in ***Webb v Fury***, 167 W Va 434; 282 SE2d 28 (1981), which granted a writ of prohibition against a libel action. However, ***Webb*** was overruled by the Supreme Court's decision in ***McDonald v Smith, supra***. As discussed above, ***McDonald*** holds that the First Amendment Petition Clause does *not* grant immunity from liability where the statements are defamatory.

The ***Azzar*** panel also cited two cases from the Eastern District of Michigan in support of its sweeping dicta: ***Pennwalt Corp v Zenith Laboratories, Inc***, 472 F Supp 413 (ED Mich, 1979), ***app dis***, 615 F2d 1362 (CA 6, 1980), and ***Baker Driveaway Co, Inc v Bankhead Enterprises, Inc***, 478 F Supp 857 (ED Mich, 1979). Neither case offers support for the proposition that either the First Amendment or ***Noerr-Pennington*** completely immunize *all* attempts to influence governmental action against *any* cause of action.

Pennwalt was an unfair competition and trademark infringement action, in which the defendant raised counterclaims for antitrust violation, interference with business relations and abuse of process based on the plaintiff's conduct in threatening and bringing lawsuits. The court held merely that the right to petition includes the right to seek redress in the courts, and that the plaintiff's actions were not "shams."

In ***Baker Driveaway***, the plaintiff claimed, *inter alia*, that the defendant had made filings with the Patent Office with the purpose and effect of delaying the issuance of a patent to plaintiff.

The court characterized defendant's claim as one for malicious prosecution – that defendants instituted groundless claims, which they knew to be groundless, solely with the intent to delay the issuance of the patent. Rejecting the plaintiff's interpretation of its claim as one for interference with its prospective contractual relations, which would come to fruition if the patent were issued, the court stated:

> In a claim for tortious interference with a prospective contractual relationship, the facts typically are that the defendant somehow induced a private third party not to enter into a contract with the plaintiff in some improper fashion. This is easily distinguished from the present case where the defendant, who admittedly is interfering, is doing so by petitioning the government. The principles of ***California Transport***, ***Pennington***, and ***Noerr*** prevent that from forming the basis for an action.

Baker Driveaway, 478 F Supp at 860.

The quoted passage contains the entirety of ***Baker Driveaway***'s discussion of ***Noerr-Pennington***, and hardly can be read as holding that *all* causes of action arising from petitioning of the government are barred by the Petition Clause. It is important to note, moreover, that there was no claim in ***Baker Driveaway*** that the defendant's petitioning was carried out through improper means, such as defamatory statements.

Aside from lacking precedential value, ***Azzar's*** broad statement is patently incorrect. In ***McDonald v Smith***, ***supra***, the Supreme Court recognized that the defendant had engaged in petitioning activity through his conduct in writing two letters to the President. The Court nonetheless upheld the plaintiff's ability to maintain a suit for defamation. Moreover, the Supreme Court's opinion directly contradicts the Court of Appeals' formulation in ***Azzar***: "[n]or do the Court's decisions interpreting the Petition Clause in contexts other than defamation indicate that the right to petition is absolute." ***McDonald***, 472 US at 484.

The Sixth Circuit has held that an action for conspiracy under ***42 USC 1985*** is not barred by the Petition Clause, where the "petitioning" is accomplished through defamation. In ***Windsor v The Tennessean***, 719 F2d 155 (CA 6, 1984), ***cert den*** 469 US 826; 105 S Ct 105; 83 L Ed 2d 50 (1984), the court, relying on ***White v Nicholls***, ***supra*** , rejected "the notion that a private person who conspires deliberately to defame a federal official in order to discredit that official in the eyes of his superiors is protected by the first amendment right to petition for redress of grievances." ***Windsor***, 719 F2d at 162.

In the case of ***In re IBP Confidential Business Documents Litigation***, 755 F2d 1300 (CA 8, 1985)[18], the Eight Circuit addressed and expressly rejected the broad immunity suggested by ***Azzar*** and adopted by the Court of Appeals in this case. After recognizing that ***Noerr-Pennington*** had been employed by courts to immunize petitioning activity outside the realm of antitrust, the court stated:

> This limited extension of the ***Noerr-Pennington*** doctrine does not support the conclusion that one who seeks to influence governmental action escapes liability for any and all injuries inflicted in the course of genuine petitioning activity. Rather, it simply establishes that courts may not award compensation for the consequences of *protected* activity. Courts can and do award damages inflicted as a result of *unprotected* activity.

In re IBP, 755 F2d at 1313 (emph. added).

The Eighth Circuit recognized the existence of a "class of unprotected activity [which] includes those activities which do not qualify for protection even if undertaken in a genuine attempt to influence governmental policy." ***Id.*** Included in this class of unprotected activity are violence,

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[18] *Rehearing en banc*, 797 F2d 632 (CA 8, 1986), *reh den* 800 F2d 787, *cert den* 479 US 1088; 107 S Ct 1293; 94 L Ed 2d 150 (1987).

illegal acts and defamation.[19] "Therefore, ***Noerr-Pennington*** does not necessarily and absolutely preclude liability for damages resulting from defamatory statements made in the course of petitioning the government." *Id.*

Notwithstanding its slanting of the facts found by the trial court throughout its opinion, the Court of Appeals did not disturb the trial court's finding that Defendant King's statements to the Wayne City Council were defamatory. Being defamatory, those statements are not afforded protection by the Petition Clause. ***McDonald, supra***. And because the statements are not protected, there is no basis for holding that Defendants are immune from liability for the damages caused thereby, either under a defamation theory or under a claim for intentional interference with business expectations.

The right to petition is unquestionably "among the most precious of liberties safeguarded by the Bill of Rights," ***United Mine Workers v Illinois State Bar Assn***, 389 US 217, 222; 88 S Ct 353; 19 L Ed 2d 426 (1967). As discussed above, however, the Petition Clause is not granted special First Amendment status. "[T]here is no sound basis for granting greater constitutional protection to statements made in a petition to the [government] than other First Amendment expressions." ***McDonald***, 427 US at 485.

The important rights of freedom of speech and the press do not provide absolute immunity against an action for defamation and, in the case of a private-figure plaintiff, do not insulate a defendant from liability for negligent defamation. There is no constitutional basis for holding that

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[19] ***See, e.g., NAACP v Claiburne Hardware Co***, 458 US 886, 916; 102 S Ct 3409; 73 L Ed 2d 1215 (1982) (***Noerr-Pennington*** does not immunize violence that is part of an otherwise protected boycott from tort liability); ***Westborough Mall v City of Cape Giradeua***, 693 F2d 733, 746 (CA 8, 1982), *cert den* 461 US 945; 103 S Ct 2122; 77 L Ed 2d 1303 (1983) (***Noerr-Pennington*** does not immunize obtaining governmental action by illegal means).

the Petition Clause affords greater immunity for unprotected, defamatory statements, or for limiting an individual who is damaged thereby to a cause of action for defamation.

The ***Noerr-Pennington*** doctrine stands for the proposition that Congress did not intend in enacting the Sherman Act to bring *protected* petitioning activity within the purview of the Act. The reasoning behind the doctrine logically may be applied to immunize *protected* petitioning from liability. ***Noerr-Pennington*** may not be read, however, to hold that a cause of action for damages arising from *unprotected* petitioning activity is barred.

In following the *dicta* from ***Azzar***, the Court of Appeals incorrectly expanded the scope of protection granted by the Petition Clause. The trial court specifically found that Defendant King had made defamatory statements to the Wayne City Council, and that those statements were the proximate cause of Plaintiff's loss of the contract to perform masonry work on the municipal swimming pool. Because defamatory statements are not *protected* activity, Defendants are not immune from the damage those statements caused, notwithstanding that the defamation was made in the course of petitioning for government action.

Michigan law clearly provides protection against interference with business expectancies and contractual relations based on and caused by defamatory statements. *See,* ***Hodgins; Lakeshore Comm Hosp, supra.*** There is no constitutional basis for depriving a plaintiff of that protection merely because the defamatory statements are made to a governmental entity rather than a private party.

The Court of Appeals' ruling that *any* cause of action, including a claim for interference with business expectations, is necessarily barred where based on conduct in the course of petitioning government, is clearly erroneous.

b. The Petition Clause Does Not Bar Actions For Damages Arising From Legitimate Petitioning Through Unprotected Conduct.

The Court of Appeals panel, after stating that the Petition Clause bars claims arising from petitioning activity "regardless of the underlying cause of action," and in apparent ignorance of the *non sequitur*, went on to quote ***Azzar***'s recognition that a the Petition Clause does not bar a cause of action for defamation. The panel then set up the straw man of the "sham" exception to ***Noerr-Pennington*** – never raised by Plaintiff[20] – so that it could conveniently be knocked down:

> Defendants (sic: *Plaintiff*) argue that if the underlying political advocacy[21] was itself defamatory, ***Noerr-Pennington*** does not apply. However, because ***Azzar*** emphatically stands for the proposition that "knowing falsehoods are generally protected under the First Amendment right to petition," (citation omitted), we read the case as standing for the proposition that defamation – injury to a person's good name – is actionable as the result of petitioning the government only where the petitioning was actually a "sham."

[***Appendix***, p. 98a].

The panel's reasoning for this "read" of ***Azzar*** is both completely opaque and directly contradictory to its holding in section III of the opinion that Defendants' defamation of Plaintiff is actionable, although erroneously stating that it was only actionable under the qualified privilege standard of ***New York Times, supra***. More importantly, this ruling is in direct conflict with the United States Supreme Court's opinion in ***McDonald***.

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[20] Plaintiff has never questioned, and does not here, that Defendants genuinely sought to have the City of Wayne reject Plaintiff's low bid and deprive Plaintiff of the contract for construction of the swimming pool. It is not Defendants *intent* that is challenged, but the false and defamatory *manner* in which they pursued the sought-after government action.

[21] Even when misidentifying Plaintiff, the panel lost no opportunity to slant the case to justify the result it wished to reach. Defendants were never engaged in "political advocacy," and J & J has never asserted that they were. As discussed below, J & J Construction has consistently argued that Defendants' conduct is not protected by the First Amendment because it did not constitute *political* advocacy, but was merely an attempt to influence the City of Wayne's conduct as another consumer in the marketplace.

As discussed above, in ***McDonald*** the Court expressly authorized an action against a defendant who had defamed a public figure through petitioning activity. The complaint in ***McDonald*** alleged that the defendant had mailed defamatory letters to President Reagan, with copies to six other federal officials, at the time that the plaintiff was being considered for the position of U.S. Attorney. The opinion does not mention any possibility that the defendant's petitioning was a "sham," *i.e.*, that defendant's true intention was not to prevent the plaintiff's appointment. To the contrary, the Court noted "that the letters had their intended effect: respondent was not appointed United States Attorney...." ***McDonald***, 472 US at 480.[22]

McDonald clearly permits an action for damages caused by defamation in a petition to government, even where the petition is genuinely intended to accomplish the purpose of influencing governmental action. *Accord*, ***In re IBP***, 755 F2d at 1313 (unprotected petitioning activity "does not qualify for protection even if taken in a genuine attempt to influence governmental policy"); ***Windsor v The Tennessean, supra***; ***Whelan v Abell***; 48 F3d 1247 (CA DC, 1995).

The Court of Appeals' holding that Plaintiff's claim for intentional interference with business expectations based on defamatory statements in a communication intended to influence governmental action is actionable only if Defendants' petitioning activity was a "sham" is clearly erroneous.

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[22] As the opinion of the Court of Appeals below recognized, where petitioning succeeds the "sham" exception cannot apply. ***Noerr, supra***, 365 US at 144.

4. THE COURT OF APPEALS CLEARLY ERRED IN HOLDING THAT DEFAMATORY ATTEMPTS TO INFLUENCE A GOVERNMENTAL ENTITY ACTING PURELY AS A CONSUMER IN THE MARKETPLACE CONSTITUTE PROTECTED PETITIONING ACTIVITY.

Federal courts which have squarely addressed the applicability of the Petition Clause and ***Noerr-Pennington*** to attempts to influence a governmental agency acting purely in the capacity of a purchaser in the marketplace have found that wrongful conduct in such attempts is not immunized from liability. Although sometimes referred to as a "commercial exception" to ***Noerr-Pennington***, the rationale behind the cases is not merely that the governmental decision at issue is commercial in nature. Rather, the cases are based on the proposition that, because the governmental entity is not acting in a "governmental" policymaking capacity, there is no constitutional basis for treating wrongful conduct aimed at affecting the decision any differently than attempts to influence a purchasing decision by a private actor.

The panel below chose to ignore this clear line of authority, breaking new ground previously untouched by state or federal courts. The panel held in a case of first impression that Defendants' actions were immune from liability under the ***Noerr-Pennington*** doctrine, despite the fact that the City of Wayne was not engaged in any legislative, regulatory or policymaking capacity. Under extensive and unbroken authority, this ruling was clearly erroneous.

a. The Court of Appeals Clearly Erred in Rejecting Unbroken Federal Case Law holding That Wrongful "Petitioning" Of Governmental Bodies Acting As A Purchaser Of Goods And Services Does Not Enjoy First Amendment Immunity.

In the seminal case, ***George R Whitten, Jr, Inc v Paddock Pool Builders, Inc***, 424 F2d 25 (CA 1, 1970), ***cert den*** 400 US 850; 91 S Ct 54; 27 L Ed 2d 88, both parties had submitted competitive bids for the sale of swimming pools and materials to governmental entities. Similar to the facts presented in this case, plaintiff claimed that the defendants wrongfully attempted to

influence public bodies' purchasing decisions by making "false statements about Whitten's lack of experience." 424 F2d at 28. The trial court granted the plaintiffs' motions for summary judgment, which were based on their argument that the alleged conduct constituted protected petitioning, specifically immunized from antitrust liability by ***Noerr***.

In reversing the grant of summary judgment, the First Circuit carefully analyzed the holding and reasoning of ***Noerr***:

> The key to this decision, in our opinion, is the Court's heavy reliance on the political nature of the railroad's activities and its repeated reference to the "passage or enforcement of laws." The entire thrust of ***Noerr*** is aimed at insuring uninhibited access to policy makers.

Whitten, 424 F2d at 32.

Responding to the defendant's argument that ***Noerr*** immunized *all* attempts to influence public officials, the court stated:

> [T]here remains the question of whether a particular attempt to influence a public official is the kind of political activity which ***Noerr*** protects. ***Noerr*** stressed the importance of free access to public officials vested with significant policymaking discretion. *We doubt whether the Court, without expressing additional rationale, would have extended the Noerr umbrella to public officials engaged in purely commercial dealings when the case turned on other issues.*

Id., 424 F2d at 33 (emph.added).

The First Circuit also considered and rejected the claim that subjecting improper interference with bidding procedures for commercial purchases would encroach on the freedom of speech and right to petition provisions of the First Amendment. The court noted that the First Amendment does not provide "the same degree of protection to purely commercial activity that it does to attempts at

political persuasion," 424 F2d at 33,[23] and does not prohibit the states from enforcing restrictions on the manner in which petitioning is conducted regarding commercial matters. ***Id.***, at 33-34.[24]

Finally, the court recognized that the bidding process which the defendant was alleged to have abused was "purely a creature of statute" designed to ensure "the maximum possible competition for the government's expenditures." ***Id***, 424 Fd at 34.

> The state legislatures, by enacting statutes requiring public bidding, have decreed that governmental purchases will be made according to strictly economic criteria. Paddock is free to seek legislative change in this basic policy, but until such change is secured, Paddock's dealings with officials who administer the bid statutes should be subject to the same limitations as its dealings with private consumers. Indeed, to hold otherwise might impair the effectiveness of competitive bidding. [Citations omitted.] *We conclude, therefore, that the immunity for efforts to influence public officials in the enforcement of laws does not extend to efforts to sell products to public officials acting under competitive bidding statutes.*

424 F2d at 33 (emph. added).

The court concluded that: "[i]n light of these considerations, we see no constitutional objection to requiring that Paddock observe the same limitations in dealing with the government as it would in dealing with private consumers." ***Id.***

Whitten's holding has been cited with approval by other federal circuits. *See,* ***Hecht v Pro-Football, Inc***, 444 F2d 931, 934-935 (CA DC, 1971), ***cert den*** 404 US 1047; 92 S Ct 701; 30 L Ed 2d 736 (1972) (rejecting "the facile conclusion that any action by any public official automatically confers [***Noerr-Pennington***] exemption; ***Israel v Baxter Laboratories***, 466 F2d 272, 276 (CA DC, 1972) (***Noerr-Pennington*** inapplicable to efforts to influence FDA to deny plaintiff's new drug

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[23] Citing ***Valentine v Chrestensen***, 316 US 52; 62 S Ct 920; 86 L Ed 1262 (1942), and ***Breard v City of Alexandria***, 341 US 622; 71 S Ct 920; 95 L Ed 1233 (1951).

[24] Citing ***United States v Hariss***, 347 US 612; 74 S Ct 808; 98 L Ed 989 (1954).

application); ***Woods Exploration & Producing Co v Aluminum Co of America***, 438 F2d 1286, 1294 (CA 5, 1971), ***cert den*** 404 US 1047; 92 S Ct 701; 30 L Ed 2d 736 (1972). The Third Circuit has also recognized that "petitioning" activity regarding purely commercial rate-setting is not protected under the First Amendment or ***Noerr-Pennington***. *See,* ***Ticor Title Ins Co v Federal Trade Comm***, 998 F2d 1129, 1138 (CA 3, 1993) ***cert den*** 510 US 1190; 114 Sct 1292; 127 L Ed 2d 646 (1994).

Several district courts have also followed ***Whitten***. In ***Buddie Contracting Inc v Seawright*** 595 F Supp 422 (ND Ohio 1984), a case with facts remarkably similar to those presented here, the plaintiff was the low bidder for a public contract. When the contract was awarded to a higher bidder the plaintiff brought an antitrust action, claiming that the defendant had conspired with the city's management consultant to obtain the contract.

Rejecting the defendant's claim of immunity under ***Noerr-Pennington***, the court held:

> ***Noerr-Pennington*** is concerned with the needs of a representative democracy in the field of public policymaking. These needs are not at issue in this case, where the parties are concerned with the award of a competitively bid contract which only incidentally involves a governmental body. The bases for the exemption, therefore, does not apply in this case.

Buddie, 595 F Supp at 439.

In ***Compact v Metro Gov of Nashville and Davidson City***, 594 F Supp 1567 (MD Tenn, 1984), the court reviewed the ***Noerr-Pennington*** line of cases and held:

> What is germane to these cases is the basic principle that the Constitution protects *political* activity by citizens when addressing government in its *legislative* capacity. There is no such protection of *commercial* activity by businessmen when dealing with the government in its *proprietary* capacity. COMPACT's activities fall squarely within the latter of the two categories. "In the absence of the legislation or a valid quasi-legislative ruling, a private person dealing with the government as buyer, seller, lessor, lessee or franchisee has no greater antitrust privilege or immunity than in similar dealings with non-governmental parties."

594 F Supp at 1573.

Again in ***General Aircraft Corp v Air America, Inc***, 482 F Supp 3 (DC DC, 1979), the plaintiff alleged that the defendant's anti-competitive activities influenced procurement decisions made by government agencies in at least three instances. Among the plaintiff's allegations were, as in this case, that the defendant had falsely disparaged the plaintiff's products and services to governmental officials and entities. In rejecting application of ***Noerr-Pennington***, the court stated:

> Courts have been reluctant to apply the ***Noerr-Pennington*** doctrine to attempts to influence government bodies acting in purely commercial matters such as procurement. Under such circumstances, the government entity is not acting as a political body, but as a participant in the marketplace. For example, government decisions concerning specifications for swimming pools, the leasing a football stadium and the award of a soft ice cream concession have been held to be outside the scope of the doctrine. [Citations omitted.]
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> * * *
>
> In reaching a decision not to purchase plaintiff's products and services, none of the government entities acted in either a legislative, adjudicatory or administrative capacity so as to place defendants' actions within the reach of the ***Noerr-Pennington*** exception. Even if this were not true, the allegedly misleading performance reports and false disparagement engaged in by the defendants would be of no assistance to a decision-maker acting in the marketplace and such conduct would not be immune from antitrust liability. The court concludes that GAC's claims for lost sales to government agencies are not barred by the ***Noerr-Pennington*** doctrine.

482 F Supp at 7-8.[25]

Most recently, in ***Lockheed Information Mgt Systems Co Inc v Maximus, Inc***, 259 Va 92; 524 SE2d 420 (2000), the Supreme Court of Virginia has held that ***Noerr-Pennington*** did not shield the defendant from liability for the common law tort of interference with contract expectancy, arising

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[25] ***See also, City of Atlanta v Ashland-Warren Inc***, 1982-1 Trade Cases, CCH ¶64,527 (ND Ga, 1981); ***Hill Aircraft & Leasing Corp v Fulton Co***, 561 F Supp 667 (ND Ga, 1982), *aff'd* 729 F2d 1467 (CA 11, 1984).

from false statements which resulted in the plaintiff being denied a government contract to privatize two child support offices of the Department of Social Services. Noting that the plaintiff was not contending that ***Noerr-Pennington*** can *never* be applied to common law business tort cases, the court stated:

> Instead, [plaintiff] argues that, regardless of whether a claim is one for a violation of an antitrust statute or a common law business tort, the ***Noerr-Pennington*** doctrine should not be applied in actions involving bid protests because such activity is not the type of petitioning of the government which the doctrine was intended to protect.

Lockheed, 524 SE2d at 426.

Based on its examination of the facts and reasoning in ***Whitten*** and ***Buddie, supra***, the court recognized a "commercial activities" exception, under which "the Noerr-Pennington doctrine does not apply to cases in which the government entity is acting as a market participant," stating:

> We find the rationale of these cases persuasive. The ***Noerr-Pennington*** doctrine was developed as a protection for entities petitioning the government in relation to legislative or policy making matters. The doctrine was not intended to shield false, misleading, or otherwise improper conduct by bidders for governmental contracts, particularly when the governmental body is acting as a private commercial entity. The extension of the ***Noerr-Pennington*** immunity to Lockheed's actions in this case would represent a significant step beyond the intended boundaries of the doctrine and would contravene the policy behind the establishment of the doctrine. Accordingly, we decline Lockheed's invitation to extend the application of the ***Noerr-Pennington*** doctrine in this case.

Lockheed, 524 SE2d at 427.

Here, the Court of Appeals' opinion unjustifiably extends First Amendment immunity to false and defamatory statements made to a city government, acting purely as a consumer of goods and services, for the sole purpose of influencing its choice of contractors. In so doing, the panel ignored established law and relied on outright avoidance of the trial court's factual findings, which were unchallenged by Defendants.

b. The Court Of Appeals' Rationale For Rejecting *Whitten* And Its Progeny Is Unsupported By Logic or Applicable Legal Authority.

In order to ensure the result which it wished to reach in this action, the Court of Appeals framed the issue in terms of facts nowhere to be found in this case. The panel acknowledged that Plaintiff's argument is that, in determining whether the Petition Clause is applicable, "the proper focus should be on the role of the governmental entity petitioned," *i.e.*, whether the government is engaged in policy making or merely acting as a market participant. [***Appendix***, p. 102a]. In what was apparently an attempt to counter the argument, the panel then stated:

> However, plaintiff cites no case that specifically identifies the "commercial exception" with the *petitioner's role as seeker of patronage* as opposed to the government's role as market participant seeking to fulfill its own needs.
>
> ****
>
> It is not obvious why different rights, duties, or immunities should apply when one is lobbying for political action *in the form of outright commercial patronage*, as opposed to legislation or enforcement actions.

[***Appendix***, p. 102a (emph. added)].

Plaintiff cited no such case because there is no factual basis in this action for describing Defendants as "seeker[s] of patronage."[26] Defendants were merely attempting to deprive Plaintiff of a contract to which it was entitled by virtue of being the lowest qualified bidder. Defendant King did not even mention that he was a Union representative or affiliated in any way with the Union, and only mentioned that Plaintiff was not a union contractor as an afterthought.

Nor does the case present any issue whether the reach of the Petition Clause should be

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[26] The language employed by the panel below is indicative of its attempt to reach the result it sought without regard to the facts found by the trial court. While "patronage" is defined as "the trade given to a commercial establishment by its customers," and alternate definition is "the power of appointing people to governmental or political positions." *The American Heritage Dictionary*, Second College Edition, 1985. The panel's choice of language can only be viewed as an attempt to put "political" spin on what was no more than a matter of commercial trade.

determined by the *petitioner*'s status. The issue is whether the First Amendment, which is clearly intended to protect citizens' rights to influence their government's decisions in the realms of law and policy making (upon which "to a very large extent, the whole concept of representative government depends," ***Noerr***, 365 US at 137), should also be interpreted to immunize *all* efforts to affect the government's purely commercial purchasing decisions. ***Whitten*** and its progeny clearly demonstrate that the answer must be "no."

The panel below recognized that Defendants here had failed "to point to [*any*] cases expressly rejecting the reasoning espoused by ***Whitten***" and that numerous courts have adopted its reasoning. The panel nonetheless cited the inapposite decision in ***Greenwood Utilities Comm v Mississippi Power Co***, 751 F2d 1484 (CA 5, 1985), as purported authority rejecting ***Whitten*** and its progeny. [***Appendix***, p. 101a].

In ***Greenwood***, a local government power agency challenged the provision of a contract between a division of the federal Department of Energy (SEPA) and a private power company, under which hydro power generated by federal dams was distributed only through the company's existing service area. The plaintiff claimed, *inter alia*, that in lobbying Congress and SEPA for the restrictive provision the defendant had conspired with governmental officials in violation of the Sherman Act.

The Fifth Circuit exhaustively examined the history of SEPA's operations and the policy reasons behind its eventual acceptance of terms limiting the obligation of private power companies to "wheel" electrical power to governmental "preference" customers to those entities already within the companies' service area. Holding that the lobbying activities were immunized from antitrust liability under ***Noerr-Pennington***, the court stated:

> The ultimate decision by the government to market power through the Southern companies reflected its implicit determination of how much competition was desirable. At any rate, the history of the companies'

> negotiating and lobbying efforts demonstrates that Congress and SEPA have given consideration to those problems, as well as concerns other than competition, when making their decisions.

Greenwood, 751 F2d at 1499.

Apparently in response to an argument by plaintiff that, solely because the challenged contract was commercial in nature, the defendant's conduct in obtaining the contract was outside the scope of First Amendment protection, the court briefly discussed what it characterized as a "commercial exception" to ***Noerr-Pennington***:

> We reject any notion that there should be a commercial exception to ***Noerr-Pennington***, because although such a distinction may be intuitively appealing it proves difficult, if not impossible, of application in a case such as ours *where the government engages in a policy decision* and at the same time acts as a participant in the marketplace.

751 F2d at 1505 (emph added).

The Court of Appeals seized upon this language as a basis for immunizing Defendants' defamatory interference with Plaintiff's legitimate expectation of being awarded the contract with the City of Wayne for which it was the low bidder. ***Greenwood***, however, is clearly inapplicable to the facts of this case. There was no "policy" decision or "policymaking" activity by a government body at issue here. The City of Wayne was purchasing goods and services under a competitive bidding process; a process designed to obtain the lowest cost qualified provider of those goods and services. This is not a traditional governmental function for which ***Noerr-Pennington*** immunity from wrongful conduct in "petitioning" is necessary or appropriate. The City of Wayne was acting not as a "government" or political body, but simply as a market participant procuring materials like any other consumer. As such, constitutional immunity is neither necessary nor appropriate, and state laws designed to protect fair competition and truthful interaction in the marketplace should apply in full. "In the absence of legislation or a valid quasi-legislative ruling, a private person dealing with

government as buyer, seller, lessor, lessee, or franchisee had no greater antitrust privilege or immunity than in similar dealings with non-governmental parties." 1 Areeda and Turner, Antitrust Law: An Analysis of Antitrust Principles and Their Applications, p. 52.

Greenwood correctly holds that the mere fact that a governmental decision has commercial ramifications does not place it beyond the reach of ***Noerr-Pennington***. Thus the court stated its agreement with the principle that "the protected status of commercial arrangements with government should hinge on the protected status of the petitioning conduct itself." 751 F2d at 1505, n. 14. The opinion cannot be read, however, as rejecting the holding of ***Whitten*** and its progeny that, where the government is acting *purely* as a market participant, neither the reasoning nor the protections of the Petition Clause are applicable.[27]

This case does not present any difficulty in marking "[t]he line between policymaking and commercial activity." ***Hill Aircraft, supra***, 561 F Supp at 675. There is no basis in the record for determining that the Wayne City Council was acting other than purely as a market participant in determining which contractor's bid should be accepted for the swimming pool contract. The trial court specifically found that Defendant King's false statements regarding Plaintiff's ability properly to fulfill that contract caused the City to reject Plaintiff's bid, and the record amply supports that

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[27] The panel also cited three cases as "distancing themselves" from ***Whitten***: ***In re Airport Antitrust Litigation***, 693 F2d 84 (CA 9, 1982) *cert den* 462 US 1133; 103 S Ct 3114, 77 L Ed 2d 1368 (1983); ***Reaemco, Inc v Allegheny Airlines***, 496 F Supp 546 (SD NY, 1980); and ***Bustop Shelters, Inc v Convenience & Safety Corp***, 521 F Supp 989 (SD NY, 1981). In each of these cases, as in ***Greenwood***, the challenged governmental action was clearly based on policy considerations, and the governmental entity was not acting purely as a consumer. The plaintiffs all relied on ***Whitten*** for the proposition, nowhere to be found in the First Circuit's language or reasoning and properly rejected by the courts, that petitioning regarding any matter touching on commercial concerns is outside the realm of First Amendment or ***Noerr-Pennington*** protection.

finding.[28]

In an attempt to shoehorn this case within the reasoning of ***Greenwood***, the panel engaged in pure speculation, stating that "the lack of mention in the minutes of any preference for union workers should not foreclose the possibility that pro-union sentiments, obviously a legitimate political consideration, affected the decision." [***Appendix***, p. 103a]. The trial court specifically found that Defendant King's false statements regarding the quality of Plaintiff's work and its ability to complete the project on time were the proximate cause of Plaintiff's loss of the contract. [***Appendix***, p. 84a, 87a]. Defendants did not challenge this finding, and the Court of Appeals did not find that it was clearly erroneous. Absent such a finding, the panel was not entitled to substitute its own theory, invented out of thin air, for the factual findings of the trial court as to the reason for the City's rejection of Plaintiff's low bid. ***Arco Industries Corp v American Motorists Ins Co***, 448 Mich 395, 419; 531 NW2d 168 (1995).

Finally, the Court of Appeals attempted to distinguish the ***Whitten*** line of cases on the ground that, "if it is proper to distinguish between government performing a purely governmental function and government seeking to fulfill its own needs, this case does not provide an opportunity to recognize it" because the Wayne's swimming pool would not be "a governmental benefit for its own operatives...." [***Appendix***, p. 102a]. Notwithstanding that ***Whitten*** itself involved bidding for public swimming pools, the panel held that, in "providing a facility for the benefit of the general public,"

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[28] The Court of Appeals stated that there was "no way to ascertain the extent to which [concerns about poor workmanship or failure to pay prevailing wage] affected the council's decision." [***Appendix***, p. 102a]. As stated above, the trial court's unchallenged finding specifically found that the statements about poor workmanship and inability timely to perform were the cause of the council's decision. Moreover, there is no basis in the record for finding that any concern about the prevailing wage issue was a *policy* consideration. Under prior Michigan law, failure to pay prevailing wage would have disqualified Plaintiff's bid; no policymaking would be involved in rejection of the bid on that basis.

the city would not be "a market participant seeking to fulfill its own needs." [*Id.*]

The argument is facile. The purpose of *all* governmental action is, at bottom, to provide benefits to the public. In carrying out that purpose, however, a governmental entity must obtain goods and services in the marketplace. Whether the purchase of a typewriter or the award of a contract for masonry work, the governmental procurement activity is no more than a commercial activity of an actor in the marketplace, and the fact that the material obtained may ultimately benefit the public does not change the commercial character of the purchase.

Neither Defendants nor the Court of Appeals have pointed to a single case where a court has held that an attempt to influence a single purchase by a governmental entity of goods or services from a particular supplier constitutes protected petitioning activity under the First Amendment. The reason for that dearth of authority is clear: as ***Whitten*** and the cases following it have held, there is no basis, either under the Constitution or under ***Noerr-Pennington*** analysis, for extending Petition Clause protection to an attempt to influence such a transaction by improper means.

The Court of Appeals clearly erred in holding that Defendants' defamation which caused the decision of the City of Wayne, acting purely as a consumer in the marketplace, to reject Plaintiff's bid was protected petitioning activity, such that Defendants were immune from liability for wrongfully and intentionally interfering with Plaintiff's legitimate business expectations.

V. CONCLUSION

The Court of Appeals opinion below is a prime example of unwarranted and improper judicial activism. Ignoring the rulings of this Court and other state and federal precedents, and clear statutory language, the panel engrafted new legal and constitutional obstacles to a private figure's ability to obtain redress for defamation and interference with business expectancy. The opinion's lack of reasoned exposition of any "need to further sacrifice tort recovery for false defamation of a

private person resulting from negligence," together with its reliance on a skewed and slanted version of the facts, rather than on the findings made by the trial court, raise a serious question whether the panel engaged in its judicial lawmaking solely in order to accomplish other goals.

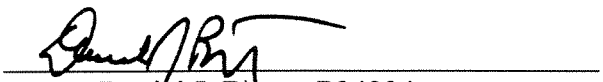
Defendants purposefully set out to deprive J & J Construction of a contract with the City of Wayne to which J & J was otherwise legally entitled as the lowest qualified bidder. To accomplish that goal Defendants employed false and defamatory accusations of poor workmanship and inability to complete work in a timely manner, with no factual basis for those accusations.

It is undeniable that, under the defamation statute enacted by the Michigan Legislature, J & J Construction would be entitled to recover for defamation and intentional interference with a contract between J & J and another private entity. The fact that the contract was with a city government provides neither a rational nor a constitutional basis for depriving J & J Construction of its right to recovery.

If private businesses are to be free to contract and do business with public entities, the opinion of the Court of Appeals must be reversed, and the rightful and proper judgment of the trial court reinstated.

Respectfully submitted,

BRADY, HATHAWAY, BRADY & BRETZ, P.C.



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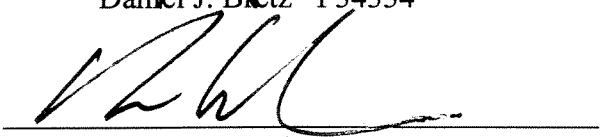

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